IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 977

ROBERT E. FUNKHOUSER, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT E. FUNKHOUSER,
Pro se,
Davidsonville, Maryland.

May 12, 1962.

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of Facts	2
Reason for Granting the Writ	37
Conclusion	40

Appendix:

Decision of March 17, 1962, USCA-4th No. 8498	1a
Order of March 27, 1962, USCA-4th No. 8502	2a
Order of April 13, 1962, USCA-4th No. 8498	3a
Order of April 13, 1962 USCA-4th No. 8552	4a

CASES CITED

Commissioner v. *Stewart*, 186 F. (2d) 239	8
Jones v. *Squier*, 195 F. (2d) 179	30
Maxwell v. *Campbell, Collector*, 205 F. (2d) 461	8
Peerless Woolen Mills v. *Rose*, 28 F. (2d) 66	8
United States v. *Yellow Cab Co.*, 90 F. (2d) 699	8
Ventura Consolidated Oil Fields v. *Rogan*, 86 F. (2d) 149	8

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Petitioner, Robert E. Funkhouser, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit, entered on March 27, 1962, affirming an order of the District Court for the District of Maryland. Petitioner's petition for rehearing was denied on April 13, 1962.

OPINIONS BELOW

The opinion of the District Court dated October 18, 1961 is printed as (E. 76-82) and it is reported at 198 F. Supp. 708 (District of Md. 1961). Affirmed March 27, 1962. Rehearing denied April 13, 1962. (App. 1a)

JURISDICTION

Case No. 8094 was combined with Case No. 8498 in the Court of Appeals and the decision of the Court was entered on March 27, 1962. A petition for rehearing was denied on April 13, 1962. (App. 3a)

Case No. 8552 was decided on March 27, 1962 and rehearing was denied on April 13, 1962. The three cases involve the same subject, were heard at the same time and decided at the same time. (App. 1a, 2a, 3a, 4a)

THE QUESTIONS PRESENTED

1. Did the Courts below so far depart from the accepted and usual course of judicial procedure, or so far sanction such departure as to call for an exercise of this Court's power of supervision?

2. Did the rules, procedure and practice of the lower court, and the enforcement of those rules and procedures deny to this petitioner due process of law?

3. Did the local rules of the lower court and the refusal, return, rejection, and withholding of important papers from the District Court Records deny due process of law to this petitioner?

STATUTES INVOLVED

The statutory provisions involved are Sections 41, 51, 54, 57, 271, 272 and 145(b) of U.S.C. Title 26. They are printed as pages 7-8 in Petitioner's Brief Case No. 8094.

STATEMENT OF FACTS

There is no dispute about the facts in these cases. The facts are all clearly stated by respondent and by the Court in the record, and as stated by respondent and by the court they show injustice and denial of due

process of law by the application of unjust rules and procedures from the beginning of this case.

The facts set out by respondent show that this petitioner complied with all of the requirements of the Internal Revenue Law of 1939 (Sec. 41, 51, 54) when he kept the required books and records and made and filed income tax returns in which he reported all gross income and all expenses. The facts are admitted by respondent and stated by the Court as follows:

> By Respondent: He (petitioner) reported gross income of approximately $360,000 upon which he paid total taxes of $235. (Brief for appellee, page 3).
>
> By the Court: In this case the Government does not charge fraud on the part of the taxpayer in the failure to report correct gross income but only alleges fraud in making deductions from gross income. (Charge to the jury, App. 8).[1]
>
> By Respondent: We have, members of the jury, at great length specified to you ONE BY ONE the various expenses which Mr. Funkhouser on his books and records, and in his income tax returns, said were incurred in connection with his business. (App. 24).
>
> By the Court: I have heard no complaint of the method of keeping the books with respect to a method of bookkeeping. The criticism of the Government is that the expenses as charged were not deductible. (App. 39).

The record shows that for the years in question petitioner kept books and records and reported gross receipts and expenditures as follows:

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[1] (App. 8) refers to the Appendix of petitioner's brief in case No. 8094.

Gross Receipts $360,000.	Gross Expenditures $360,000.
Taxable Income	Expenditures
Salary	Maintenance of rental property
Rents	Taxes
Interest on Notes	Interest
Profit on Sales	Insurance
	Fuel
	Water
	Power
	Light
	Supplies
	Labor
	Permits
	Fees
	Depreciation
Non-Taxable Income	
Payments on notes owned	Property bought to rent.
Payments on lots sold	Property bought for sale.
	Shares of Stock bought for income.
	Payments on Notes
	Store bills
	Medical expenses
	Funeral Expenses
	All other expenses

Receipts from salary	$ 51,000.00
Other receipts reported	309,000.00
Total Receipts	$360,000.00
Total Expenses	$360,000.00

The record shows every dollar received and every dollar expended was reported in minute detail. (App. 25-35)

The net taxable income was then computed and reported and the estimated tax was paid. It was then the statutory duty of the respondent to examine those returns and determine the correct amount of income subject to the tax. (Sec. 54, 57, 271, 272)

The record shows respondent made no examination of petitioner's returns and respondent set up for the prosecution of this case (Respondent's Brief, page 3) the yearly salary reported as follows:

1943 Yearly salary	$16,000.
1945 Yearly salary	$14,000.
1946 Yearly salary	$11,000.
1947 Yearly salary	$10,000.
Total Yearly salary	$51,000.

and respondent computed the tax on the basis of that *$51,000. salary; or approximately one seventh of the total $360,000 of receipts reported and* then set up 200 of the 30,000 listed items of *expense totaling approximately $90,000 or approximately one fourth of the total of $360,000 expenses reported* for the basis of the prosecution in this case. (Respondent's Brief pages 3-4). Respondent confused the jury by quoting some figures of income and some figures of expense without making a complete examination.

The Internal Revenue Law (Sec. 54, 57, 271, 272), specifically require respondent to examine the returns and set out exactly how respondent should determine the correct amount of income subject to tax and exactly how respondent should determine the tax and assess and impose the tax. (Sec. 54, 57, 271, 272) And Section 272 specifically prohibited any such proceedings as the record shows was pursued in this case. Section

145(b), the section under which this prosecution was based, specifically provides that the penalties of Sec. 145(b) are for the evasion of taxes IMPOSED by the chapter (Sections 54, 57, 271, 272).

The record shows that respondent and the District Court both knew from the beginning that the charges made in this case were illegal assumptions of an agent of respondent made in violation of Section 272 and that the case could not be legally worked, and respondent so told the Court as follows:

> By Mr. GREEN: As a matter of fact, from the beginning it was never considered possible to work this case on a net worth basis. (App. 24).[1].

The record shows that petitioner told the District Court in three letters on June 6, 1952, the same day the sentence was imposed, that the prosecution was unjust and illegal and complained to the Court that these same contentions had been presented to the Department of Justice and they had been rejected by the Department of Justice and returned to respondent before this case was started in the District Court. (Govt Ex. "A", Second Supplemental Brief)

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[1] References are to the Briefs filed in the Court of Appeals.

This case was first appealed as Case No. 8094 and (App. 24) refers to the appendix filed in that case.

Respondent filed a SUPPLEMENTAL BRIEF, AND A SECOND SUPPLEMENTAL BRIEF, they are referred to as respondent's Supplemental briefs. First and second.

The District Court held a hearing on September 11-12, 1961 and issued an opinion and Order on October 18, 1961 which was appealed and the Court of Appeals assigned a new case No. 8498 in which new briefs were filed.

References to the Briefs and Appendix filed after the rehearing of September 11-12 are referred to as (E. 7).

Other references are to specific papers as described.

The record shows that all three of petitioner's letters of June 6, 1952 were removed from the District Court records to frustrate any appeal of this case.

The record shows the FIRST LETTER was mailed to petitioner's wife to be turned over by her to local counsel.

The record shows the SECOND LETTER of June 6, 1952 was put back into the record by respondent in August 1960 as Government Exhibit "A" attached to respondent's SECOND SUPPLEMENTAL BRIEF OF THE UNITED STATES.

The record shows the THIRD LETTER of June 6, 1952 was withheld from the record until September 11, 1961 when it was returned to the District Court record as Government Exhibit M-1, M-1A, (E. 7).

The record shows respondent never made any examination of petitioner's books, records or income tax returns. The Internal Revenue Law specifically required the Commissioner of Internal Revenue to examine the returns before there is any assessment or proceeding in court for the collection of any tax from any taxpayer. (Sec. 272)

Before this proceeding could have been legally started in the District Court the Internal Revenue Law of 1939 (Sec. 54, 57, 271, 272) required respondent to examine the returns which had been filed and to determine the correct amount of income subject to the tax (Sec. 54; required respondent to examine the returns and determine the correct amount of the tax (Sec. 57); required respondent to make the computations required by the statute to determine if there was a deficiency in tax (Sec. 271); and then, if respondent did determine there was a deficiency in tax the statute

required respondent to mail a 90-day notice of such deficiency to the taxpayer and the statute afforded petitioner the right to petition the Board of Tax Appeals for a redetermination of the deficiency (Sec. 272) and the statute prohibited respondent to begin any proceeding in court for the assessment, distraint or collection of any tax until the provisions of those sections of the Internal Revenue Laws had been complied with and until the decision of the Board of Tax Appeals had become final. (Sec. 272)

The Courts have repeatedly held the assessment or collection of a tax before the provisions of Sec. 272 have been complied with is illegal.

Peerless Woolen Mills v. *Rose Collector*, 28 F. (2d) 66
Venture Consolidated Oil Fields v. *Rogan, Collector*, 86 F. (2d) 149
United States v. *Yellow Cab Co.*, 90 F. (2d) 699
Maxwell v. *Campbell, Collector*, 265 F. (2d) 461
Commissioner v. *Stewart*, 186 F. (2d) 239

Those cases and many other cases have held that the collection of a deficiency in tax before the decision of the Board of Tax Appeals has become final is illegal. The record shows there was no examination, notice of redetermination in this case and this case was prosecuted in violation of the statute on "assumed figures" set with the knowledge that the case could not be legally worked. Respondent said:

> By Mr. GREEN: As a matter of fact, from the beginning it was never considered possible to work this case on a net worth basis. (Tr. 6-3-52, page 1360)

The record shows, by the testimony of respondent's agents, that respondent had made no examination of the returns. Respondent's agent testified that no inquiry had been made about the listed items of expense—not even the very first item—set up by respondent for this prosecution (App. 28, 35, 36, 46), the agent testified that respondent had made no calculation of the listed items of expense, (App. 27), had made no computation of the allowable depreciation (App. 48); had made no tabulation of any of the listed items of expense. (App. 27)

The record shows the District Judge went so far from the accepted and usual course of judicial proceedings as to tell the agent and the jury that no tabulation of the listed items of expense was at all necessary. The Judge said:

> By Judge Chesnut: Well, now, have you made any tabulation? I do not think that it is at all necessary, I am merely inquiring as to whether you have made any tabulation of what his aggregate amounts are for that year, which appear on these books. That is to say, if his gross receipts were seventy thousand dollars, and his expenses were, say, sixty nine thousand dollars, what amount of that sixty nine thousand of expenses were not represented by available vouchers, or papers, or receipted bills. Answer: No, sir, we have not made such calculation. (App. 27).

The record shows that Judge Chesnut then took over and prosecuted the case by asking 3404 questions for 8725 lines of the record.

The record shows that for that year respondent and the Court found that petitioner had reported gross receipts of Seventy Thousand Dollars and expenses of

"say, sixty nine thousand dollars" and then respondent without making any examination, or tabulation, or calculation of the items, set up for that year the sum of $16,000. as Yearly Salary reported (Brief and Appendix for Appellee, page 4) which was only about one fourth of the total receipts reported for that year, and respondent set up and presented that figure to the District Court, the District Court jury, and to the Court of Appeals of the Fourth Circuit as "Evidence of the wilful intent to evade the payment of taxes" (Respondent's Brief filed in the Court below on March 15, 1962, page 4).

When the record shows that respondent took less than one fourth of the total receipts reported for that year and then without making any inquiry, calculation, computation or tabulation of the total amount reported and set that one fourth up as evidence of the evasion of the "assumed taxes" in violation of law (Sec. 54, 57, 271, 272) petitioner says that he was denied due process of law.

Petitioner stoutly maintains that fact is proved when the Court told respondent: "I do not think any tabulation is at all necessary, I am merely inquiring as to whether you have made any tabulation of what his aggregate amounts are for that whole year, which appear on these books". (Tr., 5-21-52, page 24). At the very beginning of the case and then at the end of the case when the Court ruled on 6-3-52 (page 1413):

> By JUDGE CHESNUT: Well, he (the agent) does it because he is an official of the United States authorized to determine what tax is correct according to the contention of the Government, but Mr. Golomb (Petitioner's accountant) is not an official of the United States and he has no author-

> ity to tell this jury what the tax is and what the tax is not. (Tr., 6/3-52, page 1413)

Those facts together with respondent's admission to the Court:

> By Mr. GRAVEN: As a matter of fact, from the beginning it was never considered possible to work this case on a net worth basis.

show that the lower court so far departed from the accepted and usual course of judicial proceedings and justice, and denied to petitioner due process of law as to call for an exercise of this court's power of supervision.

The record shows that before there was any examination, inquiry, calculation, computation or tabulation this case was presented to the Department of Justice for criminal prosecution. The Department of Justice made inquiry about the facts, called petitioner's lawyer and accountant to the Department with the records, examined them, rejected respondent's contentions and returned the case to respondent for the examination required by Internal Revenue Law (Sec. 54, 57, 271, 272).

The record shows that thereafter respondent made no examination of the books, records, or returns, made no inquiry (App. 28, 35, 36, 46) made no calculation, (App. 27), made no computation (App. 48), made no tabulation (App. 27) and in violation of law (Sec. 54, 57, 271, 272), and after the rejected and return of the case by the Department of Justice, respondent just went, or sent, some "assumed figures" to the United States Attorney in Baltimore and confused the United States Attorney as to the facts, "assumed figures" and

confused this petitioner, R. E. Funkhouser of the District of Columbia, with R. J. Funkhouser of West Virginia (E. 47).

The record shows that respondent, Bernard Flynn, and the Court then speculated that some one else, perhaps a Mr. Ramsey or a Mr. Green or somebody else signed the indictment (E. 46-47) may have forged the name of Bernard J. Flynn above the typewritten words United States Attorney to give the phony, false, forged indictment an appearance of an official indictment. (See the phony, forged indictment set up in violation of Rule 7(c) of the Federal Rules of Criminal Procedure.) It is highly improbable that Ramsey or any other lawyer or assistant, or employee, or any one else with any authority as a Government lawyer signed or had any thing to do with it. Whoever did it carefully avoided any responsibility for any part in the phony, false, confused, illegal contentions which he knew could not be worked (App. 24), which he knew had not been determined (E. 27, 28), which he knew were set up on "assumed figures" which had not been inquired about (App. 28, 35, 36, 46), calculated (App. 27), computed (App. 48), tabulated (App. 29), assessed (E. 27), imposed (E. 27, 28) and on which respondent had not mailed the required 90-day notice (E. 27); and the Board of Tax Appeals had not made any redetermination (E. 27); which he knew was required by statute (Sec. 272) before any deficiency in taxes could be imposed, due, owing, payable or evaded as charged (Sec. 272).

When whoever signed Bernard J. Flynn's name on that phony, false, fake indictment he knew that the case had been rejected by the Justice Department and he purposely did not sign his name but forged the name

of Bernard J. Flynn because he knew that Bernard J. Flynn had not made any inquiry about the facts (E. 47) and Bernard J. Flynn had been confused and knew nothing about it. Bernard J. Flynn testified as follows:

> By Bernard J. Flynn: I don't have any recollection of being present before the grand jury.
>
> I don't have any recollection of the facts in connection with this particular case at all.
>
> The fact of the matter, and I think we were confused with another Mr. Funkhouser all along, and I was surprised to find out you weren't the same man. I thought you were from West Virginia. (E. 47)

The record shows that this case was started in the District Court on a phony, false, forged, confused indictment not signed by the attorney for the Government as required by Rule 7 (c) of the Federal Rules of Criminal Procedure and the record shows that this was deliberately done after respondent knew from the beginning that the case could not be worked on a net worth basis (App. 24), and after the case had been rejected by the Department of Justice. (Government's Exhibit "A") also Exhibit M-1 (E. 5).

The record shows also that the case was never presented to or voted on by members of the grand jury as there is no record of the number of jurors concurring in the finding of the indictment as is required to be prepared and filed with the clerk of the court by Rule 6 (c) of the Federal Rules of Criminal Procedure.

The record shows that petitioner questioned the legality of the grand jury proceeding and designated the record for transmission to the Court of Appeals but there was no record to be transmitted. (See

record) Respondent had endeavored to place the facts in the District Court record by answers to interrogatories served on members of the grand jury but the District Court, at respondent's request, ordered petitioner to cease submitting interrogatories to members of the grand jury (R. 229).

The record shows that when petitioner questioned the practice of presenting forged papers in District Court the Court said:

> By JUDGE THOMSEN: He (Bernard J. Flynn) didn't sign the indictment. He said Mr. Ramsey signed the indictment as the Assistant United States Attorney in charge of the matter, which was in accordance with the practice of this Court during Mr. Flynn's administration, during subsequent administrations, and there is nothing wrong with it. . . . Mr. Ramsey signed the indictment. He said Mr. Green signed Mr. Flynn's name in certain other situations in which he was responsible, and that is the regular practice, and there is no use in your going any further with this point. It is an utter waste of time. You have made your point, and I have listened to it, and I am telling you now that I am not going to give any weight to this point because there is nothing to it. (E. 46-47)

Petitioner says that record of the beginning of this case in the United States District Court shows the need of the exercise of this Court's power of supervision to stop the injustice of the District Court making a regular practice of flouting the requirements of the Federal Rules of Criminal Procedure to start a criminal prosecution in violation of Internal Revenue Law (Sec. 54, 57, 271, 272 and Federal Rules of Criminal Procedure Rules 4(c) and 7(c).

The record shows that local District Court practice and Rule was only one of four local District Court Rules which brought injustice denial of due process of law and the illegal sentence in this case. Other local Court Rules which brought about the illegal conviction and sentence in this case were:

THE FIRST UNJUST DISTRICT COURT RULE

The District Court Rule under which any resident of the District of Columbia could be prosecuted in the District Court of Maryland because respondent maintained an office in Baltimore. That Local Court Rule was made after the fines and fees of the Bowles Case showed the profit from the prosecution of income tax cases in Baltimore. It was enforced in this case.

When the injustice in this case was called to the attention of petitioner's Senator, Representative in Congress, the Joint Committee of Internal Revenue Taxation, The House committee of Ways and Means and others, the Congress of the United States by 72 Stat. 512, approved August 6, 1958 corrected that unjust rule and provided that thereafter a defendant can be tried in the judicial district in which he was residing when the alleged offense of tax evasion was committed. That Statute has corrected the injustice so forcifully and unjustly displayed in this case but it has not removed the injustice done to this petitioner by that rule, while it was enforced in this case.

THE SECOND UNJUST DISTRICT COURT RULE

The record shows this proceeding was started on an unjust local District Court Rule which permitted irresponsibility and recklessness to start this case. The Federal Rules of Criminal Procedure require the indictment to be signed by the attorney for the govern-

ment. (Rule 7(c)). The purpose of that rule is to prevent just such recklessness as started this case in the District Court.

The indictment was not signed by the United States Attorney as it purports to be. Bernard J. Flynn testified that he did not sign the indictment. His name on the paper is a forgery put there by someone who accepted no responsibility for the paper. Petitioner was thus deprived of due process of law when respondent's agent or the Assistant United States Attorney who told the Court that "As a matter of fact, from the beginning it was never considered possible to work this case on a net worth basis" signed Bernard J. Flynn's name to a paper to be set up in violation of Rule 7(c) as an indictment. Bernard J. Flynn testified that he was confused about the facts and about the defendant. He testified "We were confused with another Mr. Funkhouser all along, and I was surprised to find out you weren't the same man. I thought you were from West Virginia." The agent or whoever forged Mr. Flynn's name on that paper knew those facts and he dodged all responsibility by forging Bernard J. Flynn's name and accepting no responsibility on himself. A direct violation of Rule 7(c) of the Federal Rules of Criminal Procedure which brought irrepairable injury and injustice to this petitioner.

Judge Thomsen stated the District Court Rule which permitted such injustice as follows:

> By JUDGE THOMSEN: He said Mr. Ramsey signed the indictment as the Assistant United States Attorney in charge of the matter, which is in accordance with the practice of this Court during Mr. Flynn's administration, during subsequent administrations, and there is nothing wrong with it. (E. 47)

ARGUMENT

The record shows the party who signed the indictment did not sign it as the Assistant United States Attorney but just plain forged the name of Bernard J. Flynn as though Flynn had actually signed it. It was a plain forgery not signed by Flynn or by any Assistant United States Attorney. It was a plain misrepresentation that it had been signed by Bernard J. Flynn, United States Attorney in the full execution of his duties as required by Rule 7(c) of the Federal Rules of Criminal Procedure.

The only purpose of the Federal Rules of Criminal Procedure Rule 7(c) requiring the indictment to be signed by the attorney for the Government was to place responsibility on the Government Attorney for the duties entrusted to him in connection with the presentation of the facts to the grand jury. In this case Bernard J. Flynn did not present any facts to the grand jury (E. 47). He made no inquiry about the facts. (E. 47). He was confused about the facts (E. 47). He was confused about the charges and about the facts and was confused with another Mr. Funkhouser all along. (E. 47). He testified "I was surprised to find out you weren't the same man. I thought you were from West Virginia." (E. 47).

The record shows that as a result of Bernard J. Flynn's confusion and somebodys forging his name on that phony, false, confused indictment, this Mr. Funkhouser from Washington, D. C. was confused with the Mr. Funkhouser from West Virginia and Bernard J. Flynn did not sign the indictment as required by the Federal Rules of Criminal Procedure, Rule 7(c).

The paper shows that it was not signed by any Assistant and it shows no other signature. It was a plain forgery of the name of Bernard J. Flynn United States Attorney, put there in violation of Rule 7(c) of the Federal Rules of Criminal Procedure to start this illegal prosecution of this Mr. Funkhouser from Washington, D. C.

THE THIRD UNJUST DISTRICT COURT RULE

The local District Court Rule 55 prohibited any person accused of a crime being represented by a lawyer who was not a resident of, and who did not maintain an office in the district.

The record shows that when this petitioner was arrested in Washington, D. C. he hired T. Howard Duckett, a reputable Washington, D. C. lawyer to represent him and he was immediately confronted with the Local District Court Rule No. 55 which required a local counsel resident of and maintaining an office in the District (Respondent's Brief, pages 5-6). The record shows that the Clerk waived the rule to the extent of entering the appearance of Mr. Duckett but the District Court a few days thereafter appointed G. C. A. Anderson to head a committee to study the existing Rules and make recommendations for such changes as might seem appropriate. The record shows that G. C. A. Anderson and his committee recommended the retention and the enforcement of the local Rule and the Rule, was retained and enforced as a Rule of the District Court. Mr. Duckett was advised (Respondent's Brief, p. 6) to seek the services of Mr. G. C. A. Anderson, the law partner of Judge Chesnut's son-in-law Wilson K. Barnes (E. 54) and Mr. Duckett and petitioner went to see Judge Chesnut's son-in-law

Wilson K. Barnes and he employed G. C. A. Anderson and his law firm of Anderson and Barnes and Morrow (Respondent's Brief, page 6) as petitioner's local lawyers as required by the local District Court Rule.

Petitioner paid G. C. A. Anderson and the Law Firm of Anderson and Barnes a $10,000.00 fee for representing petitioner in the case.

The record shows that the local counsel failed to properly represent petitioner. The record shows the local counsel:

1. Raised no objection to the false, phony, forged indictment.
2. Raised no objection to the prosecution of "assumed figures" set up as taxes owed, due, payable and evaded when no deficiency in tax had been determined.
3. Raised no objection when respondent's agent testified that he had made no inquiry about the listed items.
4. Raised no objection when the agent testified that he had made no calculation, computation or tabulation of the listed items.
5. Raised no objection when the agent testified that he had made his calculations of "assumed taxes" on six different sets of "assumed figures" all of which he knew to be reckless assumptions and to be wrong from the beginning.
6. Raised no objections to the agent's perjury from page five of the record.
7. Raised no objection when the District Court misquoted the applicable Internal Revenue Law by

quoting only the last 62 words of Section 145(b) as the applicable law. (Charge, page 12, App. 8).

8. Cited no applicable Internal Revenue Law.

9. Gave petitioner a choice of paying for an appeal before the case was completed or having the local counsel ask his partner's Father-in-law to impose the sentence immediately, be fingerprinted, and start the sentence at once.

10. The record shows G. C. A. Anderson then discussed, determined, and quoted a minimum fee of seven or eight thousand dollars for an appeal of the case.

ARGUMENT

The record shows that these ten items are only a few of the many unjust and illegal effects resulting in this case from the Local District Court Rule requiring a local lawyer for this proceeding. Respondent now admits this rule was so unjust that: "This rule has not been enforced in recent years in criminal cases and has been amended." (Respondent's Brief, page 6). The injustice has been corrected since this case. It should be corrected in this case.

The record shows that while the case was still going on and before the case was concluded G. C. A. Anderson discussed the question of an appeal with petitioner and Mr. Anderson quoted fees larger than petitioner could immediately raise and when an appeal fee was not paid before the case was concluded Mr. Anderson decided that there would be no appeal of the case if the jury rendered a verdict of guilty. Mr. Anderson was called as a witness by the Court and he testified to the Court as follows:

By Mr. ANDERSON: Your Honor, my recollection of the circumstances are briefly these: This case had been going on for quite sometime. There had been some talk whether there should be an appeal or whether there should not be an appeal.

After the charge and after the jury went out, and this is my clear recollection too, we were sitting in what was then the old library, the old Federal Court Library, and Mr. Funkhouser—I said to Mr. Funkhouser at that time, "Do you want to take an appeal or don't you want to take an appeal? If you want to get it over with as fast as you can or right away, the thing to do is go on down and sign one of those papers and start your sentence. If you want to take an appeal, why, all right."

We had previously advised him that we didn't think his chances on the appeal were very good,

He said, "No, the jury is out, and if they find me guilty, that's it," or words to that effect.

The jury came in; the jury found him guilty.

He said he wanted to start it right away, just as we had previously discussed it, and then he went down and signed it and was fingerprinted, and that was the incident. (E. 57)

THE FOURTH UNJUST LOCAL DISTRICT COURT RULE

This rule consists of a number of unjust, lax, and illegal practices regarding District Court papers which brought injustice in this case as follows:

1. The District Court issues no receipt for any paper filed.
2. The District Court in violation of Rule 6(c) of the Federal Rules of Criminal Procedure neither received nor filed a grand jury record required in this case.

3. The District Court received and recorded a phony, false, forged indictment not signed by the United States Attorney as required by Rule 7(c) of the Federal Rules of Criminal Procedure.

4. The phony, false, forged indictment was not signed by any Assistant United States Attorney or any one who could be identified and was a plain forgery of the United States Attorney's name to illegally destroy the rights of this plaintiff. It was received by the District Court knowingly and in accordance with an established rule or practice stated by the Court as follows:

> By JUDGE THOMSEN: He (the United States Attorney) didn't sign the indictment. He said Mr. Ramsey signed the indictment as the Assistant United States Attorney in charge of the matter, which is in accordance with the practice of this Court during Mr. Flynn's administration, during subsequent administrations, and there is nothing wrong with it.
>
> Mr. FUNKHOUSER: Your Honor, he says Mr. Ramsey didn't sign it.
>
> JUDGE THOMSEN: He says Mr. Ramsey did sign it.
>
> Mr. FUNKHOUSER: And Mr. Green signed it also.
>
> JUDGE THOMSEN: No, no. Mr. Ramsey signed the indictment. He said Mr. Green signed another one. He said Mr. Green signed Mr. Flynn's name in certain other situations in which he was responsible, and that is the regular practice, and there is no use in your going any further with this point. It is an utter waste of time. You have made your point, and I have listened to it, and I am telling you right now that I am not going to give any weight to this point because there is nothing to it. (E. 46-47).

The indictment was signed "Bernard J. Flynn, United States Attorney." It was not signed by Ramsey or any other Assistant. It was a plain forgery of the United States Attorney's Name to affect the legal rights of this petitioner and set up a phony, false, forged indictment in violation of Rule 7(c) Federal Rules of Criminal Procedure.

The phony, false, forged indictment was not signed by the attorney for the Government and there was no record made, or kept, or filed with the clerk of the District Court of the number of jurors concurring in the finding of the indictment as required by Rule 6(c) of the Federal Rules of Criminal Procedure, and the violation of both Rules 6(c) and 7(c) of the Federal Rules of Criminal Procedure together with the forgery, (E. 46) and false assumed charges (App. 48-49) and admitted confusion of this Mr. Funkhouser with the Mr. Funkhouser from West Virginia (E. 47) and respondent's admission that from the beginning it was never considered possible to work this case on a net worth basis (App. 24). All of those things combined with the fact that respondent had made no examination as required by Sec. 54, 57, 271, 272 and had mailed no 90-day notice and had assessed and imposed no tax (E. 27-28) and no tax was due, owing, payable or evaded as charged (E. 26, 27, 28) make the circumstances surrounding this phony, false, forged indictment to begin this case an important issue which this Honorable Court must consider. It was the basis on which this petitioner was denied due process of law and justice.

5. The District Court issued no acknowledgment of receipt of petitioner's Notice of Appeal of 6-6-52. (E. 9-10). Three months later the Court told

Mr. Sorrell that the appeal paper had been received, read, and the fact that it concerned petitioner's appeal had been noted as follows:

By JUDGE CHESNUT: Now, I recall receiving a letter from Mr. Funkhouser during that period, shortly after, and before present counsel came into the case, which was generally to the effect that he had no idea of appealing. (App. 54).

6. The Notice of Appeal was not acknowledged or filed in the District Court records and was mailed to petitioner's wife for filing by counsel.

7. The second letter of June 6, 1952 was not acknowledged as received, it was not recorded in the District Court Records, and it was withheld from the District Court Records for over eight years until it was returned in August 1960 as Government Exhibit "A" attached to the SECOND SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES. That letter of June 6, 1952 was returned to the District Court files in 1960 by respondent to confuse the Court of Appeals into believing that it was the only letter written by petitioner to the District Court on June 6, 1952. Respondent said in that SECOND SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES:

RESPONDENT'S BRIEF PAGE ONE: Funkhouser stated in his brief that this letter had been returned by Judge Chesnut to Mrs. Funkhouser in some manner unspecified and that thereby Judge Chesnut had frustrated Mr. Funkhouser's effort to appeal his conviction.

The first supplemental brief on behalf of the United States pointed out the inherent improb-

ability of this claim. Since that supplemental brief was filed, new information has come to the attention of the United States Attorney, which new information makes Mr. Funkhouser's position with respect to the alleged letter completely untenable.

Judge Chesnut has found four letters in his file which we feel should be brought to the Court's attention. They do not appear in the record of the proceedings before Judge Thomsen, but neither does Mr. Funkhouser's purported letter to Judge Chesnut, nor was it made a part of the record below by proffer or testimony. We now find that Mr. Funkhouser did write to Judge Chesnut on June 6, 1952; that the letter was never returned to Mr. Funkhouser; and that, as will appear from the photostatic copy of this letter, which is filed herewith as Government Exhibit A, it does not mention the subject of appeal. . . . It refers to Judge Chesnut and Appellant having been imposed upon—the same claim Mr. Funkhouser made in Exhibit A, except that in the letter of June 6, 1952 Mr. Funkhouser says that Judge Chesnut was imposed upon, whereas in the letter of December 3, 1932, he says, "I still feel that you and I were imposed upon at that trial." . . . Without seeking to labor the point made by these exhibits, we mention the fact that Mr. Funkhouser has not claimed that he wrote two letters on June 6, 1952, and it would be most remarkable if he had done so and not mentioned it in his letter of December 3, 1952.

We respectfully submit that the claim that Appellant attempted to appeal his conviction within the time for appeal has been completely discredited and that the present appeal should be denied.

ARGUMENT

The record shows that on that basis petitioner's appeal was denied. Appellant contended that he had written Judge Chesnut THREE LETTERS ON JUNE 6, 1952.

(1) A NOTICE OF APPEAL (E. 9-10).

(2) A SECOND LETTER complaining of imposition. (Government Exhibit "A")

(3) A THIRD LETTER complaining of imposition and deceit and other things. (Government Exhibit M-1, M-1A)

The record shows that ALL THREE of those LETTERS were kept out of the District Court Records to frustrate any appeal of the case. The FIRST LETTER was mailed to petitioner's wife in Washington, D. C. (Exhibit M-6 E. 9-10)

The second letter went directly into Judge Chesnut's personal file where it was kept until it was disgorged as Exhibit "A" of the SECOND SUPPLEMENTAL BRIEF OF THE UNITED STATES in August 1960 and presented to the Court of Appeals as positive proof that the FIRST LETTER had not been written. Judge Chesnut released that SECOND LETTER of June 6, 1952, which he had received, not acknowledged, not recorded and had held in his private file from June 6, 1952 until he released it in August 1960 to prove the "inherent improbability of petitioner's claim that he had mailed the NOTICE OF APPEAL of June 6, 1952".

The record showed and petitioner had quoted that Judge Chesnut had admitted to Mr. Sorrell on September 10, 1952 that he had received a letter concerning petitioner's appeal:

> By JUDGE CHESNUT: Now, I recall receiving a letter from Mr. Funkhouser during that period, shortly after, and before present counsel came into the case, which was generally to the effect that he had no idea of appeal. (Tr. 9-10-52, page 11)

The record shows that none of petitioner's letters to Judge Chesnut after the sentence was imposed at 10:00 A. M. on June 6, 1952 were recorded in the District Court Record and in August 1960 the SECOND LETTER of June 6, 1952 was fished out of Judge Chesnut's private file to prove that THE FIRST LETTER OF June 6, 1952 was not written. However it will be noted that respondent kindly pointed out that the SECOND LETTER of June 6, 1952 "did not mention the subject of appeal". The subject of appeal had been taken care of in the FIRST LETTER of June 6, 1952 (see E. 9-10), and the SECOND AND THIRD LETTERS of June 6, 1952 were written to Judge Chesnut at the suggestion of James S. Morrow, an employee of Judge Chesnut's son-in-law, Wilson K. Barnes and G. C. A. Anderson who were then discussing the minimum fee they were to charge petitioner for the appeal or for a new trial before Judge Chesnut and Mr. Morrow insisted that Judge Chesnut be told that he had been imposed upon by respondent.

Respondent said; to cinch the matter in the Court of Appeals:

> "Without seeking to labor the point made by these exhibits, we mention the fact that Mr. Funkhouser has not claimed that he wrote two letters on June 6, 1952, and it would be most remarkable if he had done so and not mentioned it in his letter of December 3, 1952."

THEN, RESPONDENT SAID:

> "We respectfully submit that the claim that appellant attempted to appeal his conviction within the time for an appeal has been completely discredited and that the present appeal should be denied."

Respondents bravado overlooked two important facts. Petitioner and others knew that the letters had been written and received by Judge Chesnut and he knew where they were and that they would reappear in the District Court Record. The guff about there being only one letter was inexcusable bluff because respondent, Judge Chesnut and others knew there were three letters written from the Baltimore Jail on June 6, 1952 and that they had been received, read and commented on and were then in petitioner's and Judge Chesnut's possession and that they would be produced in Court. The heedless production of the SECOND LETTER as the ONLY LETTER of June 6, 1952 was inexcusable while the THIRD LETTER lay there beside it. (Government Exhibit M-1 and M-1A).

Petitioner asks this Honorable Court to consider this bluff by respondent to bilk petitioner out of an appeal of this illegal case.

Respondent in the SUPPLEMENTAL BRIEF had argued:

> The record clearly demonstrates that Mr. Funkhouser's assertions with respect to the alleged letter of June 6, 1952, were made, in almost identical form as now, in the 1958 proceedings in both the District Court and the Court of Appeals. The adverse decision is the law of the case, and the question cannot properly be raised for the second time.
>
> In the hearing in the District Court Mr. Funkhouser failed to produce any evidence with respect

to the alleged letter of June 6, 1952, and even if the assertion could properly been raised for the second time, the District Judge correctly denied the motion. (Pages 2-3).

ARGUMENT

The record shows that respondent having been able to confuse the Court of Appeals once by withholding from the District Court Records the letters of June 6, 1952 and get the decision based on the absence of the papers being then withheld from the record tried here to have the appeal frustrated again by still withholding ONE OF THE LETTERS. When petitioner could not then produce the letter which Judge Chesnut was holding in his private file respondent tried to capitalize on the withholding to frustrate any appeal of this illegal case.

Respondent in THE SUPPLEMENTAL BRIEF SAID:

> The contention with respect to the alleged letter having no basis whatever in the record, this Court, on October 13, 1958, held that the action to correct the sentence was properly overruled, and the action of the District Judge was affirmed. (Page, 6)

ARGUMENT

It is obvious that both respondent and the District Judge believed that as long as all the letters and papers were kept off the District Court Record the action of the District Judge could keep the sentence from being corrected. "The action of the District Judge was affirmed" . . . before the papers were returned to the record.

Respondent in the SUPPLEMENTAL BRIEF SAID:

> The record shows unmistakably that the issue of the alleged letter of June 6, 1952, was brought

into controversy, in almost identical form as now, by Mr. Funkhouser's prior motion.

The 1958 decisions of the District Court and of the Court of Appeals finally and authoritatively settled the dispute, and that issuable fact, once legally determined, is conclusive as between the parties. Mr. Funkhouser cannot avoid the consequences of the adverse determination by the simple act of filing new motions. (Page 7).

Respondent then quoted *Jones v. Squier*, 195 F. 2d. 179:

"Public policy requires that there should be and end of litigation and the litigants are entitled to protection from harassment by attempts to relitigate questions already finally determined". (Page 7).

ARGUMENT

The record shows that petitioner tried to get the facts before the Court long before he was able to shake out the proof in the papers then being withheld from the District Court Records by respondent and the District Court Judge. Respondent said there was never but one letter to Judge Chesnut on June 6, 1952 while Judge Chesnut withheld the other two letters in his private file. Full proof was not completely available to petitioner until more of the papers were returned. More have not been returned to the District Court file but the record shows that other important testimony and papers are still being withheld to frustrate this appeal. See Petition for Writ of Mandamus in case No. 8552 Court of Appeals for the Fourth Circuit and sealed papers in the Record of this case.

Respondent in the SUPPLEMENTAL BRIEF SAID:

> In view of the inconsistent position taken by him in the post-conviction motion and hearing of September 10, 1952, it is extremely improbable that Mr. Funkhouser mailed such letter to Judge Chesnut. The present action is a collateral attack upon a prior final judgment of the District Court, and the burden was on Mr. Funkhouser to present evidence sufficient to overcome the presumption of regularity attached to the manner in which Judge Chesnut discharged his duties. (Pages 7-8)

ARGUMENT

The record shows that at the time of the post-conviction motion and hearing of September 10, 1952 petitioner was in the Federal Reformatory at Petersburg, Virginia. He told the lawyer his son had hired to press the appeal that he had filed the Notice of Appeal but Judge Chesnut told the lawyer that petitioner had not filed a Notice. Petitioner could not then prove that Judge Chesnut had received the Notice and the lawyer wisely refrained from pressing the matter which he could not prove and he pursued the courses which seemed most prudent to him after talking to Judge Chesnut. With all the papers removed from the District Court records and with Judge Chesnut withholding TWO OF THE LETTERS of June 6, 1952 in his private file and with petitioner's Affidavit of Facts out of the District Court, and petitioner working in the Garden of the Petersburg Reformatory in Petersburg, Virginia the lawyer was in no position to take an "inconsistent position" on anything and the record shows that he did not. The record shows that it took petitioner nine years after he got out of prison to locate the missing letters and proof now in the record.

8. Petitioner's wife's letter of June 13, 1952 to Judge Chesnut was not acknowledged, filed or recorded in the District Court records. It was withheld by Judge Chesnut from June 13, 1952 until September 11, 1961 when it was filed as Government Exhibit M-1 and M-1A.

9. Petitioner's Affidavit of Facts of June 28, 1952 was filed in the District Court by Mr. Sorrell (Tr. 9-10-52, page 12) but it was removed from the District Court Record and was mailed by Judge Chesnut to petitioner at Petersburg Prison on July 9, 1952 with letter:

> By JUDGE CHESNUT: I am returning the long paper which you have sent me in the event you wish to make other use of it by conference with your new counsel or otherwise. (Exhibit B. of SECOND SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES).

10. No record of how the Transcript of Record of 5-21-52 was removed from the Court Records.

11. No receipt showing who received 228 papers into the District Court Record in this case.

12. No record of the filing or removal of the Transcript of 9-10-52 in the District Court. Record of the removal and withholding of that Transcript from the Record until 12-18-60.

13. No record in District Court of the rejection of petitioner's Notice of Appeal of 10-24-61 by the Clerk of the District Court.

14. No record of the rejection of petitioner's Motion for rehearing of 12-27-61.

The record in this case shows that all of the above items were in accord with the policy of the District Court as stated by the Court as follows:

> By Judge Chesnut: I receive many such applications within sixty days of the imposition of the sentence and I take the trouble to read most of them, but this last one, well, I think it was received possibly a day or so before or after the sixty days, but it was not presented to me by counsel, and of course, you would not reasonably expect me to take the initiative in it, to communicate with counsel in order to discuss the matter. (Tr., 9-10-52, pages 17-18)

ARGUMENT

The above record shows that this petitioner has been denied due process of law and petitioner prays this Honorable Court to exercise its power of supervision in the interest of justice in this case.

Respondent in the Supplemental Brief said:

> "The crime defined in 26 U.S.C.A. Int. Rev. Code, Sec. 145(b) may be committed by taking fraudulent deductions from gross income reported as well as by fraudulently failing to report income received." . . . . Funkhouser reported gross income of approximately $360000.00, upon which he paid total taxes of $235.00.
>
> The fraudulent business deductions disallowed by the United States comprised some 200 items totaling $90,000.00, and the taxes evaded during the five year period exceeded $28,000.00. Mr. Funkhouser kept his own books and records, and all of his deductions, including those disallowed, were charged to one of the following catagories: Miscellaneous: Miscellaneous Property, Property Improvements, Maintenance, Labor, Interest or depreciation. . . . . As further evidence of the

wilful attempt to evade the payment of taxes, the United States produced four financial statements signed by Mr. Funkhouser and submitted by him to the Prince George's Bank and Trust Company. . . . These statements contained the following information:

1943 Yearly Salary	$16,000.00
1945 Yearly Salary	14,000.00
1946 Yearly Salary	11,000.00
1947 Yearly Income	10,000.00
Total Salary Reported (Respondent's Brief, Pages 9-11)	$51,000.00
Additional Receipts Reported	$309,000.00
Total Receipts Reported	$360,000.00

ARGUMENT

This case was unjust and illegal from the beginning when it was based on charges of fraud and tax evasion based on figures set up from a fraction of the total gross receipts reported and on the listed expenses a fraction of which (200 items) represented only a fourth of the total expenditures.

The salary reported ($51,000.00) represented only about one seventh of the total of $360,000.00 reported; much of which was not taxable income. The $90,000.00 expenses listed as money paid out was only about one fourth of the $360,000.00 received, listed and accounted for in the books and records and returns.

Without having made any inquiry, calculation, computation, tabulation or examination of the whole $360,000.00 received and accounted for this prosecution was illegal and in violation of Internal Revenue Law (Sec. 54, 57, 271, 272).

The prosecution on "assumed figures" (App. 48-49) based on a fraction of the total receipts and a fraction of the total expenditures was illegal. The sentence based on those "assumed figures" without any examination was illegal. The removal of District Court papers to frustrate any appeal of this case was illegal. The Opinion and Order of the District Court was not based on the facts in the record and it should be re-examined and corrected. The illegal sentence should be corrected.

It was unjust, illegal and a violation of due process of law to take 200 of the listed items from the 30,000 listed items and charge those items were fraudulent. The payment of those items had been made from the $360,000.00 receipts received during the period and the law required that the total amount received be accounted for.

Every dollar was accounted for (App. 25-54).

> THE COURT SAID: I have heard no complaint of the method of keeping the books with respect to a method of bookkeeping. The criticism of the Government is that the expenses as charged were not deductible. (App. 39)

Petitioner's receipts were not confined to salary ($51,000) but included other receipts ($309,000).

Of that $309,000. of other receipts some money was paid out for funeral expenses, medical bills, store accounts, purchase of property, etc., every item of which was itemized and listed.

The books and records and income tax returns were so complete that respondent could point out and specify

each item ONE BY ONE. Respondent told the District Court and the jury:

> By MR. GREENE: We have, members of the jury, at great length specified to you one by one the various expenses which Mr. Funkhouser on his books and records, and in his income tax returns, said were incurred in connection with his business. (App. 24).

Had Mr. Funkhouser not reported the funeral expenses, the medical expenses, the store bills, the purchase of property etc. the returns would not have been complete and accurate.

Had Mr. Funkhouser not reported the $90,000 expended for the 200 items bought in the period his returns would have not been complete and accurate and would not have complied with the requirements of Sec. 41, 51, 54 of the Internal Revenue Law. By reporting every dollar received and every dollar expended so that they could be specified "ONE BY ONE" the taxpayer complied with the law and the law then required the respondent to examine those returns and determine the correct amount of income subject to the tax (Sec. 54) determine the correct amount of the tax (Sec. 57), make the required computations and determine if there was a deficiency in tax (Sec. 271), and then if respondent determined there was a deficiency in tax respondent was required to mail a 90-day notice of such deficiency and the law provided that petitioner could then petition the Board of Tax Appeals for a redetermination of the deficiency (Sec. 272) and it was then provided by the law that no assessment of a deficiency and no proceeding in court for collection should be begun until the decision of the Board of Tax Appeals had become final (Sec. 272).

The record shows that without any examination or any compliance with any of the provisions of the Internal Revenue Law (Sec. 54, 57, 271, 272 or 145(b)) this proceeding was begun on several different sets of "assumed figures" set up by respondent in violation of the law and it was prosecuted in violation of Section 272 and all the rules of justice above mentioned and many, many more as shown in the record but not repeated here in more detail only because there are over 200 such items and repetition has already become burdensome. Many of them have been mentioned herein and in other papers filed and petitioner prays this Honorable Court to please review the complete record of injustice from the phony, false, forged indictment based on confusion of the United States Attorney (E. 46-47) to the instructions to the jury as quoted on page 11 of the SUPPLEMENTAL BRIEF OF APPELLEE.

The rules and practices herein complained of are shown to be common practice in the District Court and as such they affect many people, deny due process of law and do much injustice.

REASONS FOR GRANTING THE WRIT

The record shows that the Opinion and Order of the District Court appealed from was based on the testimony of G. C. A. Anderson who was called as a witness by the District Court and testified as a Court witness that before the case was concluded; before the sentence was imposed; before the verdict of the jury; and before the defendant knew he would be convicted; that this petitioner had decided not to appeal the sentence. (E. 5).

The record shows that G. C. A. Anderson testified there was no discussion of fees for an appeal (E. 71-

73), and that immediately after the verdict he asked Judge Chesnut to immediately impose the sentence; although Mr. Morrow at petitioner's request had asked the Court to defer the sentence for a day or two (E. 71). The record shows that Judge Chesnut then paroled petitioner in the custody of C. G. A. Anderson for 18 hours and then imposed the sentence. (E. 70).

The record shows that G. C. A. Anderson then had petitioner sign a paper by which he had petitioner begin the sentence immediately, which Anderson witnessed and filed with the clerk (E. 56-57), and Anderson had petitioner fingerprinted "and that was the incident" (E. 56-57).

The record shows that from that Court testimony the District Court concluded that petitioner's Notice of Appeal (E. 9-10) was not written and mailed to Judge Chesnut on June 6, 1952, but that "it was fabricated long after that date and never mailed to the District Court". (E. 78, 79). The Opinion ignores the fact that in addition to that letter the record shows petitioner wrote three additional letters that same day, June 6, 1952, complaining of injustice, deceit, the fact that the Department of Justice had examined and had rejected respondent's contentions and that an examination of the returns would show that no tax was due or evaded as charged in the false, forged, confused, indictment and asking for an estimate of the costs of the appeal.

The record shows that all FOUR of those letters written immediately after the sentence was imposed on June 6, 1952 were received and read. That none of them were acknowledged and that all of them were withheld from the District Court record for over nine years. (E. 5, 9, 10, 6, 7, 72).

The record shows this was done in accordance with District Court practice as expressed by Judge Chesnut at the time as follows:

> By Judge Chesnut: I receive many such applications within sixty days of the imposition of the sentence and I take the time to read most of them, but this last one, well, I think it was received possibly a day or so before or after the sixty days, but it was not presented to me by counsel, and of course, you would not reasonably expect me to take the initiative in it, to communicate with counsel in order to discuss the matter. (Tr. 9-10-52, pages 17-18).

The record shows that none of the letters of June 6, 1952 were filed in the District Court Records, or acknowledged, and they were kept off the District Court Record for over nine years when one of them was filed by respondent as Exhibit "A" with Respondent's Second Supplemental Brief; another was presented from Judge Chesnut's personal file as Government Exhibit M-1 (E. 6-7); and Judge Chesnut had by then apparently forgotten about the first letter as he testified:

> By Judge Chesnut: To the best of my recollection and belief I did not receive the questioned letter of June 6th from Mr. Funkhouser either then or at any time thereafter and knew not the contents or purported contents thereof until I had read in the appeal of Mr. Funkhouser to the Court of Appeals in his case his statement by I think—I'm not sure whether it was a per curiam statement, but I think it was Judge Sobeloff speaking for the Court, that Mr. Funkhouser had said that he had written me this questioned letter and that the United States Attorney, Mr. Pearson, had produced a letter of June 6th of a different import, which I had received. . . . (E. 34-35).

That may well have been one of the many letters which Judge Chesnut received after the imposition of the sentence which he did not take the time to read; or it might have been mailed to petitioner's wife by one of his clerks or a deputy clerk who claimed and still exercise the right to return papers they prefer not to file in the District Court Records. They still exercise that privilege in the District Court (See Petition for Writ of Mandamus, Ex. A, B, C, D, Case No. 8552).

ARGUMENT

By rejecting, returning and withholding papers mailed to the District Court the Court and its employees have deprived this petitioner of just judicial proceedings and an accurate and full record of the facts in this case.

The Opinion and Order of October 18, 1961 appealed from was based on incomplete and erroneous records and testimony which should be reconsidered in the interest of justice.

The record in all three cases, No. 8094, No. 8498 and No. 8552 shows the court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure as to call for an exercise of this court's power of supervision.

CONCLUSION

The petition for a writ of certiorari should be granted and the case should be set down for argument.

Respectfully submitted,

ROBERT E. FUNKHOUSER,
Pro se,
Davidsonville, Maryland

May 12, 1962

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8498

UNITED STATES OF AMERICA, *Appellee*,

v.

ROBERT E. FUNKHOUSER, *Appellant*.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Roszel C. Thomsen, District Judge.

(Argued March 19, 1962. Decided March 27, 1962.)

Before SOBELOFF, *Chief Judge*, and SOPER and HAYNSWORTH, *Circuit Judges*.

ROBERT E. FUNKHOUSER, *Pro Se*, and JOSEPH D. TYDINGS, United States Attorney, (DANIEL W. MOYLAN, Assistant United States Attorney, on brief) *for Appellee*.

PER CURIAM:

Affirmed upon the opinion of the District Court, 198 F. Supp. 708 (D. Md. 1961).

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8552

ROBERT E. FUNKHOUSER, *Petitioner*,

v.

WILFRED W. BUTSCHKY, Clerk, United States District Court for the District of Maryland, and ARTHUR J. ROBERTSON, Chief Deputy Clerk, United States District Court for the District of Maryland, *Respondents*.

ON PETITION FOR WRIT OF MANDAMUS

On consideration of the petition of Robert E. Funkhouser for writ of mandamus; the argument had by him in support thereof, and the argument of the United States Attorney for the District of Maryland in opposition thereto,

It is now here ordered and adjudged by this Court that the petition for writ of mandamus be, and the same is hereby, denied.

March 27, 1962.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

MORRIS A. SOPER
United States Circuit Judge.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

(SEAL)

A true copy,
Teste:

Richard M. F. Williams, Jr., Clerk,
United States Court of Appeals for
the Fourth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8498

ROBERT E. FUNKHOUSER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Order

The court, upon consideration of the appellant's petition, adheres to its disposition of the case and hereby denies a rehearing.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit

MORRIS A. SOPER
United States Circuit Judge

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge

April 13, 1962

(SEAL)

Filed
Apr. 13, 1962

R.M.F. Williams, Jr
Clerk

A true copy,
Teste:

Richard M. F. Williams, Jr., Clerk,
U. S. Court of Appeals for
the Fourth Circuit.

By Margaret L. Davis,
Deputy Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8552

ROBERT E. FUNKHOUSER, *Petitioner*,

v.

WILFRED W. BUTSCHKY, Clerk, United States District Court for the District of Maryland, and ARTHUR J. ROBERTSON, Chief Deputy Clerk, United States District Court for the District of Maryland, *Respondents*.

Order

Upon consideration of the appellant's Petition for Rehearing, the same is hereby denied.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit

MORRIS A. SOPER
United States Circuit Judge

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge

April 13, 1962

(SEAL)

Filed
Apr. 13, 1962

R.M.F. Williams, Jr.
Clerk

A true copy,
Teste:

Richard M. F. Williams, Jr., Clerk,
U. S. Court of Appeals for
the Fourth Circuit.

By Margaret L. Davis,
Deputy Clerk.

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No. 977

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Rule involved	2
Statement	3
Argument	4
Conclusion	10

CITATIONS

Cases:

Bowles v. *United States*, 73 F. 2d 772, certiorari denied, 294 U.S. 710	6
Commerford v. *United States*, 64 F. 2d 28, certiorari denied, 289 U.S. 759	5
Cook v. *United States*, 171 F. 2d 567, certiorari denied, 336 U.S. 926	5
Davis v. *United States*, 328 U.S. 582	9
Fooshee v. *United States*, 203 F. 2d 247	5
Ford v. *United States*, 233 F. 2d 56, certiorari denied, 352 U.S. 833	5
Funkhouser v. *United States*, 260 F. 2d 86, certiorari denied, 358 U.S. 940	3, 6
Funkhouser v. *United States*, 282 F. 2d 341	4
Lane, In re, 135 U.S. 443	6
United States v. *Funkhouser*, 198 F. Supp. 708	4, 7, 8
United States v. *Johnson*, 327 U.S. 106	9
United States v. *Morgan*, 346 U.S. 502	5
Wheatley v. *United States*, 159 F. 2d 599	6
Wiltsey v. *United States*, 222 F. 2d 600	7

641043—62

Statute:
Internal Revenue Code of 1939, Sec. 145(b), 26 U.S.C. (1952 ed.) 145(b) ..... Page 5
Miscellaneous:
Rules of the United States Supreme Court, Rule 22(2) 4
Federal Rules of Criminal Procedure:
Rule 7(c) 7
Rule 35 ..... 3, 4, 5, 6
Rule 37 ..... 2, 3
Rule 52(a) 6

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 977

ROBERT E. FUNKHOUSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1a) is reported at 299 F. 2d 940. The opinion of the district court is reported at 198 F. Supp. 708.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1962 (Pet. App. 1a). Rehearing was denied on April 13, 1962 (Pet. App. 3a). The petition for a writ of certiorari was filed on May 16, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner is entitled to correction of sentence under Rule 35, F.R. Crim. P., because of alleged insufficiency of the evidence, lack of jurisdiction of the district court, invalidity of the indictment or denial of choice of counsel.

2. Whether petitioner filed a timely notice of appeal from the judgment of conviction.

RULE INVOLVED

Federal Rules of Criminal Procedure:

Rule 37. Taking Appeal; and Petition for Writ of Certiorari

(a) *Taking Appeal to a Court of Appeals.*

* * * * *

(2) Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

STATEMENT

Petitioner was convicted by a jury of five counts of income tax evasion on June 5, 1952, was sentenced to one year's imprisonment and a $25,000 fine on June 6, 1952, and, on the same day, elected in writing not to appeal his conviction but to commence serving his sentence (Supp. R. 24–25).[1] Petitioner served his sentence, paid his fine, and was ultimately paroled. No notice of appeal was filed within the time prescribed by Rule 37 of the Federal Rules of Criminal Procedure, and an untimely motion to extend the time for taking an appeal was filed and denied.

Nearly six years later, on March 28, 1958, petitioner filed a motion under Rule 35 of the Federal Rules of Criminal Procedure to correct the sentence imposed on June 6, 1952. This motion was denied. *Funkhouser* v. *United States*, 260 F. 2d 86 (C.A. 4), certiorari denied, 358 U.S. 940.

After denial of certiorari in 1959, petitioner renewed the motions and amplified his pleadings in the district court. The motions were denied after a hearing. On appeal, petitioner presented for the first time in an appendix to his brief a letter which he contended to be a timely notice of appeal filed by him with Judge W. Calvin Chesnut on June 6, 1952 (R. 55). Thereafter, the United States introduced a letter sent by petitioner to Judge Chesnut on June 6, 1952, and which was received by Judge Chesnut, stating that petitioner appreciated the fair treatment given him by the judge at the trial. On the ground that it was

[1] "R." and "Supp. R." refer, respectively, to the appendices to petitioner's and the government's briefs in the court below.

inappropriate to consider petitioner's new factual issue for the first time on appeal, the court of appeals remanded the matter to the district court with instructions to receive evidence upon the issue thus raised. *Funkhouser* v. *United States*, 282 F. 2d 341 (C.A. 4).

At the hearing in the district court, Judge Chesnut and his secretary testified that the purported letter of June 6, 1952, had never been received by him (Supp. R. 13–20). Based upon the evidence presented at the hearing, the court held (*United States* v. *Funkhouser*, 198 F. Supp. 708, 711 (D. Md.)):

> I find that the disputed letter was never sent but was fabricated long after its purported date. I would cite defendant for perjury in connection therewith if I did not believe that his obsession with having his name cleared has affected his judgment. I conclude that he is entitled to no relief on this issue.

ARGUMENT

1. The court of appeals denied rehearing on this appeal on April 13, 1962. Since petitioner's motion to correct sentence under Rule 35 of the Federal Rules of Criminal Procedure is in a criminal case, he had thirty days to file a petition for writ of certiorari. Rule 22(2) of the Rules of this Court. Petitioner, however, did not file his petition until May 16, 1952, three days after the expiration of the thirty-day period and therefore his petition is out of time.

2. In any event, even if the petition were not out of time, petitioner's contentions are without merit.

a. Petitioner contends that his motion to correct sentence should have been granted because he was convicted prior to a precise computation and assessment of his civil tax liability. This contention which was rejected by this Court on petitioner's earlier attempt to obtain certiorari, misconceives the scope of a motion to correct sentence under Rule 35 of the Federal Rules of Criminal Procedure and is, in any event, without substance.

Rule 35 authorizes the correction only of sentences which the judgment of conviction did not authorize. *United States* v. *Morgan*, 346 U.S. 502, 506; *Cook* v. *United States*, 171 F. 2d 567, 570 (C.A. 1), certiorari denied, 336 U.S. 926; *Fooshee* v. *United States*, 203 F. 2d 247 (C.A. 5). Petitioner's motion did not, and could not, assert that the sentence here imposed was not within the maximum (imprisonment for five years and fine of $10,000) authorized for each violation of Section 145(b) of the Internal Revenue Code of 1939. In contending that a precise computation and assessment of his civil tax liability were conditions precedent to any criminal prosecution for wilful attempted tax evasion, petitioner is, in effect, challenging the sufficiency of the evidence to convict. Even if such a motion under Rule 35 were available as a substitute for an appeal, there is no merit in the contention. *Ford* v. *United States*, 233 F. 2d 56, 58–59 (C.A. 5), certiorari denied, 352 U.S. 833; *Commerford* v. *United States*, 64 F. 2d 28, 30 (C.A. 2), certiorari denied, 289 U.S. 759.

b. Petitioner suggests (Pet. 15) that the court which convicted him did not have jurisdiction. He reasons

that venue was in the District Court for the District of Columbia, where he was a resident, and not in the District Court for the District of Maryland, where petitioner filed his income tax return. But, as the court of appeals held on petitioner's appeal on his earlier motion to correct sentence, venue was properly in the latter district because that is where the crime was actually committed. 260 F. 2d 86; accord, *Bowles* v. *United States*, 273 F. 2d 772 (C.A. 4), certiorari denied, 294 U.S. 710.

c. Petitioner contends that the indictment was improperly signed by an Assistant United States Attorney who presented the case to the jury in the name of the United States Attorney, Bernard J. Flynn.[2] First, even if this was error, it was not a ground for correction of sentence under Rule 35. Second, it is well established that an error in the signature of the indictment by the prosecuting attorney, or, indeed, his failure to sign it at all, does not invalidate the indictment. *E.g.*, *In re Lane*, 135 U.S. 443, 449; *Wheatley* v. *United States*, 159 F. 2d 599, 600–601 (C.A. 4). Similarly, Rule 52(a) of the Federal Rules of Criminal Procedure, provides that "[a]ny error, defect, irregularity or variance which does not affect

[2] Petitioner stresses (Pet. 12–13, 16, 17) a statement made by Mr. Flynn that petitioner had been mistaken by the government with another Mr. Funkhouser. Mr. Flynn, who did not present the case to the grand jury, was apparently momentarily confused by the similarity of petitioner's name to that of a party in another case. There is no doubt, however, that petitioner was clearly identified to the grand jury which indicted him, the petit jury which convicted him, and the court which sentenced him.

substantial rights shall be disregarded." A mistake in signing the indictment, even if the signature here was a mistake, clearly affected no substantial rights. Third, the district court held that the action in this case was consistent with the "long-standing practice" in the District of Maryland. 198 F. Supp. at 711. Rule 7(c) of the Federal Rules of Criminal Procedure provides that indictments "shall be signed by the attorney for the government." The practice of having Assistant United States Attorneys sign for their superiors, like typewritten signatures (*Wiltsey* v. *United States*, 222 F. 2d 600 (C.A. 4), is in no way inconsistent with this Rule.

d. Petitioner argues (Pet. 18–20) that he was prevented from retaining counsel of his own choosing to represent him at his trial by a rule of the district court requiring parties to be represented by attorneys with offices in the district. The district court held that no evidence supported this contention. On the contrary, the record shows that petitioner employed T. Howard Duckett; that Mr. Duckett, with the concurrence of the clerk of the district court, entered an appearance for petitioner at the start of the proceedings and this appearance was never stricken; that Mr. Duckett determined that the trial should be handled by another attorney and took the defendant to meet G. C. A. Anderson who subsequently represented petitioner; and that petitioner never complained at any time during the trial of his counsel's efforts. (198 F. Supp. at 712). Thus, it is clear that petitioner was represented by counsel of his own choice. Petitioner's

contentions that his counsel did not adequately represent him are on their face frivolous.

e. Finally, petitioner contends (Pet. 26–33) that he filed a timely notice of appeal from his original conviction. This claim is plainly without merit for three reasons. First, it is not an argument which is cognizable in a motion to correct sentence. Second, even if petitioner's claim is accepted and his motion is treated as an appeal, his substantive contentions are groundless. And third, it is clear that no timely notice of appeal was in fact filed.

The district court held, after an extensive hearing, that petitioner had not sent the purported letter dated June 6, 1952, to Judge Chesnut, indicating that he would appeal. As Judge Thomsen summarized the evidence before him (198 F. Supp. 708, 710–711):

> The admittedly genuine letter [also dated June 6, 1952] is written in ink, misspells the Judge's name, and contains figures different from those in the disputed letter, which is in pencil, correctly spells the Judge's name, and gives internal evidence of having been written after checking the record.
>
> Judge Chesnut denied receiving the disputed letter. Mrs. Riede testified that she did not recall receiving or seeing any such letter, although she always opened the Judge's mail. She further testified that it was Judge Chesnut's regular practice to transmit any such letter to the Clerk, with a covering letter or memorandum, and to reply to the writer.
>
> Judge Chesnut's fairness is proverbial; his scrupulousness in handling his correspondence with prisoners is an example to all judges. It

> is incredible that he would have failed to transmit such a letter to the Clerk.
>
> The conclusion that the disputed letter was never sent to Judge Chesnut is supported by other evidence. A copy of the genuine letter was found in defendant's clothes by his wife, but the whereabouts of the disputed letter during the eight years before it was produced is not shown. More importantly, the disputed letter was not mentioned in (1) the motion to extend time for appeal, filed on June 20, 1952, (2) a long letter defendant wrote Judge Chesnut on July 9, 1952, (3) a letter defendant wrote the Judge on December 3, 1952, in which he mentioned the genuine letter, (4) the motion which he filed in 1958, (5) the appeal from the ruling thereon, or (6) any of the motions which he filed in 1959.
>
> I find that the disputed letter was never sent but was fabricated long after its purported date. I would cite defendant for perjury in connection therewith if I did not believe that his obsession with having his name cleared has affected his judgment. I conclude that he is entitled to no relief on this issue.

It is of course established that a finding of fact may not be overturned on appeal unless clearly erroneous and unsupported by evidence in the record. *E.g.*, *Davis* v. *United States*, 328 U.S. 582, 593–594; *United States* v. *Johnson*, 327 U.S. 106, 111–113. The finding of the district court was supported by the testimony of Judge Chesnut, his secretary, and petitioner's trial counsel (Supp. R. 13–20, 23–27). No conflicting evidence other than petitioner's own self-serving declarations was introduced (Supp. R. 2–4).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 977

ROBERT E. FUNKHOUSER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

ROBERT E. FUNKHOUSER,
Petitioner
Davidsonville, Maryland.

June 20, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITIONER'S REPLY BRIEF

JURISDICTION

The petition for a writ of certiorari was timely filed on May 16, 1962 under the extension granted by Chief Justice Warren extending time for filing the petition to May 25, 1962.

THE QUESTION PRESENTED

Petitioner complains of the sentence in this case on the grounds that he was illegally convicted and sentenced under Section 145(b) of the Internal Revenue Law of 1942 which provides:

> SEC. 145(b): FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO DEFEAT OR EVADE TAX.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

The penalties of that Section can only be imposed for the evasion of taxes imposed by the chapter. The record shows that no taxes had been imposed by the chapter on this petitioner. (E. 57-58).[1] Petitioner had reported all gross income and all expenses. (Pet. 3). Respondent fully admits this fact on page 3 of Respondent's brief in the Court of Appeals where respondent said:

> "He reported gross income of approximately $360,000. . . . Evidence of the wilful intent to evade the payment of taxes was shown when the Government produced in evidence four financial statements signed by Mr. Funkhouser and submitted by him to the Prince Georges Bank and Trust Company on July 22, 1943, March 1, 1945,

[1] (E. 57) refers to appendix of petitioner's brief in Court of Appeals. (App.) refers to appendix of petitioner's brief in Court of Appeals. Other references are to specific records and papers.

April 24, 1946, and April 29, 1947, respectively. These statements contain the following items:

July 22, 1943	Yearly salary	$16,000.
March 1, 1945	Yearly salary	$14,000.
April 24, 1946	Yearly salary	$11,000.
April 29, 1947	Yearly income	$10,000.
	Total	$51,000.

whereas the tax returns filed by Mr. Funkhouser for those years indicated a net loss in 1943 and 1945 of $697.46 and $4,346.21, respectively, and a net profit in 1946 and 1947 of $1,430.24 and $2,500.02, respectively." (Brief and Appendix for Appellee p. 3-4).

The testimony of respondent shows that for all of the years respondent made no inquiry, calculation, computation or tabulation of petitioner's books, records and returns. (App. 28, 35, 36, 46, 27, 48).

Respondent knew, and respondent told the District Court:

> By Mr. Green: As a matter of fact, from the beginning it was never considered possible to work this case on a net worth basis. (Tr. 6-3-52, page 1360).

Respondent just set up the $51,000 listed as salary for four of the five years which was about one seventh of the total gross income reported, and then without making any examination, calculation, inquiry, computation or tabulation (App. 24-48) respondent's agent set up about one fourth, or $90,000 of the $360,000 gross expenses reported by petitioner and charged them as "fraudulent deductions" for this prosecution. (Respondent's brief, pages 3-4).

Respondent ignored the fact that $360,000 gross income was reported and $360,000 expenses were re-

ported. Every item of receipts and every item of expenses was reported to comply with the requirements of Sections 41, 51, 54 of the Internal Revenue Law. The record shows that respondent found every item of income and every item of expenses listed. Respondent said:

> By Mr. Green: We have members of the jury, at great length specified to you one by one the various expenses which Mr. Funkhouser on his books and records, and in his income tax returns, said were incurred in connection with his business. (Tr. 6-4-52, page 4).

The Internal Revenue Law (Sec. 54, 57, 271, 272) then required the respondent (not the petitioner) to examine those returns and to determine which of the listed items of expense were legally allowable as deductions from gross income for the determination of the correct amount of income subject to tax.

The listing of every item of income and every item of expense was necessary to show all the facts and was not fraudulent as charged. (Sec. 54, 57, 271, 272).

The record shows the books, records and returns were turned over to respondent for the required examination but respondent never made any examination, inquiry, calculation, computation or tabulation (App. 27, 28, 35, 36, 45, 46, 48); never mailed any 90-day notice of deficiency as required by Section 272 (E. 27-28) and just set up several different sets of "assumed figures" for the calculations (App. 48) and made several different sets of calculations on those "assumed figures" (App. 48-49) and charged them as taxes due, owing and evaded for this prosecution (App. 48-49).

The record shows that respondent took those "assumed figures" to the Department of Justice and they

were examined by Andrew F. Oehmann, the then head of the criminal tax section. Oehmann is now the Executive Secretary to Attorney General Robert Kennedy, and Andrew F. Oehmann ascertained that there had been no examination, that the figures were "assumed figures" set up without any examination, inquiry, calculation, tabulation or determination of the correct amount of income subject to tax as required by statute (Sec. 54), without determination of any deficiency (Sec. 271), without any notice of deficiency as required by Sec. 272, and in violation of the expressed requirements of Section 272.

Andrew F. Oehmann as Head of the Income Tax Criminal Section of the Department of Justice promptly rejected the "assumed figures" and returned the papers to the Internal Revenue Service for the required examination. (Government Exhibit "A").

The record shows that thereafter respondent made no inquiry, examination, calculation, tabulation, determination of any deficiency, notice of deficiency, assessment of any deficiency and respondent's agent just took the "assumed figures" to Bernard J. Flynn, United States Attorney in Baltimore, Maryland, and confused the United States Attorney as to the charges and as to the identity of the defendant (E. 47).

Petitioner contends that on those facts as put into the record by respondent there could thereafter be no legal conviction or sentence in this case. Those are the simple facts as stated by respondent, Andrew F. Oehmann, Head of the Criminal Section of the Department of Justice and Bernard J. Flynn, the United States Attorney. (Government Exhibit "A" and E. 47).

The Local District Court Rule 55 and local judicial procedure deprived petitioner of his counsel and forced petitioner to hire the son-in-law of the local Judge and his partners for the trial of the case. (E. 54, 55, 56). The son-in-law of the Judge, who lived with the Judge (E. 54-55) and his partners raised no objection to the trial of petitioner on a forged, confused indictment (E. 46-47); on "assumed figures" known to be wrong; and so admitted by respondent to the Judge in open court (Tr. 5-27-52, page 495; and the local counsel determined before the case was concluded, and before the verdict of the jury, that if petitioner did not agree to the payment of a predetermined fee for an appeal that he would have the Judge sentence petitioner the very next day; have petitioner sign a paper which he would file in the court to have petitioner begin serving a sentence at once, have petitioner fingerprinted and immediately shipped out of Baltimore while he and his associates discussed and determined the minimum fee to charge petitioner for an appeal of the case. (E. 57-73). The letter mentioned by G. C. A. Anderson when he was testifying as a Court witness on page E. 72 was rejected in the record but was filed as Exhibit "A" attached to the petition for Mandamus, (Case 8552) and it shows that after the sentence was imposed on June 6, 1952 and after petitioner's Notice of Appeal of June 6, 1952 had been received by the Court (Tr. 9-10-52, page 11) and mailed to petitioner's wife for filing by local counsel, that Anderson and Morrow discussed the fee for the appeal and they determined and quoted a minimum fee of seven or eight thousand dollars on June 19, 1952 at which time they proposed to use the Notice of Appeal filed by petitioner on June 6, 1952.

The letter (E. 72) referred to by G. C. A. Anderson (testifying for the Court), was written by James S. Morrow on June 19, 1952, three days after the time for filing an appeal had expired but Mr. Morrow knew that Judge Chesnut had received petitioner's notice of appeal and the other two letters of June 6, 1952 and that the Judge had noted that the Notice of Appeal had appealed the case. Mr. Morrow knew that the letter had then been mailed to petitioner's wife for transmission to counsel to enable counsel to share in the fees for the appeal and that there was then no rush to discuss and decide the fees to be charged. The letter shows that Morrow and Anderson leisurely discussed the fees to be charged and decided that "the minimum fees would probably run between seven and eight thousand dollars". (Exhibit "A" of Motion in United States District Court, rejected by the Clerk of the District and filed as an Exhibit attached to Petition for Mandamus in Case No. 8552, one of the cases of the petition in this Court).

That letter written by James S. Morrow, Jr., on June 19, 1952, thirteen days after the sentence was imposed and quoting "minimum fees of between seven and eight thousand dollars" for the law firm of Anderson, Barnes and Coe for continuing the prosecution of the appeal under the Notice of Appeal filed by petitioner on June 6, 1952. All of the parties knew that the appeal would have to be prosecuted under the Notice filed by petitioner on June 6, 1952 as no Notice of Appeal could be filed after June 19, 1952. Wilson K. Barnes, the son-in-law of Judge Chesnut knew that Judge Chesnut had received petitioner's Notice of Appeal of June 6, 1952 and that his law firm could earn the quoted fee of seven or eight thousand dollars for

prosecuting the appeal on the Notice filed by petitioner on June 6, 1952. He lived with Judge Chesnut at 111 Ridgewood Road, Baltimore 10, Maryland and shared the same house, telephone, food, light, heat and he knew that his law firm could not quote a fee of "between seven and eight thousand dollars" for an appeal of this case on June 19, 1952 without availing itself of the Notice of Appeal filed by petitioner on June 6, 1952. Anderson, Barnes, Coe and Morrow all knew the Notice of Appeal had been filed by petitioner on June 6, 1952 and that no other Notice of Appeal could be filed or would be necessary to appeal this case.

> JUDGE CHESNUT STATED IN OPEN COURT: Now, I recall receiving a letter from Mr. Funkhouser during that period, shortly after, and before present counsel came into the case, which was generally to the effect that he had no idea of appealing. (Tr., 9-10-52, p. 11).

The record shows that the Notice of Appeal of June 6, 1952 was the only letter received by Judge Chesnut from petitioner shortly after the sentence was imposed and before present counsel (W. Byron Sorrell) came into the case which mentioned petitioner's idea of appealing. (App. 55).

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Page 2

Petitioner notified the District Court in writing on June 6, 1952, the same day the sentence was imposed that he had discharged his lawyer, Anderson, and was addressing himself directly to the Court, complained about the trial and asked the Court to "please examine the record and accept this as my notice of appeal, motion for a new trial, or appeal of this case No. 21794".

Petitioner contends that was full compliance with the Rule Involved and that if it were not so considered by the District Court the rule required the clerk to prepare and file forthwith a notice of appeal on behalf of the defendant.

Reply to Page 3

Petitioner says that immediately after the sentence was imposed and while in the Marshal's lock-up he was confronted by G. C. A. Anderson of counsel who had represented him in the trial who advised him that it was a necessary duty imposed on him by the Court to secure defendant's signature on the paper presented and that under the shock of the imposition of the sentence, being handcuffed, and placed in the Marshal's lock-up he signed the paper presented to him by the lawyer upon the representation of counsel that it was a necessary Court paper for him to secure. Petitioner contends that paper signed in confusion and shock a few minutes after the imposition of the sentence was of no lasting or binding importance as petitioner was afforded by law a period of ten days after the imposition of the sentence in which to determine and file a Notice of Appeal.

Petitioner says that immediately upon his recovery from the shock of the imposition of the sentence he wrote and had mailed to the District Court a Notice of Appeal (App. 55). And petitioner says that later on that same day he wrote two additional letters to the United States District Judge who had imposed the sentence (Government Exhibit "A" and Government Exhibit M-1) in each of which he complained of imposition and deception by respondent in the trial, complained that the case had been rejected by the

Department of Justice before it was presented to the United States Attorney for the forged, false, phony, confused indictment; and petitioner offered in both of those letters proof of the facts and referred the Court to verification of the facts by a Certified Public Accountant. (Govt. Ex. "A").

Petitioner says that it took him over six years to assemble enough proof of the injustice of the trial and conviction to hazard the Motion of March 28, 1958 and the result shows that motion was premature as important papers were still being withheld from the record.

By late 1959 petitioner had proof that the Notice of Appeal and other letters of June 6, 1952 had been received by the Court and not filed in the Court record, that the indictment was a forgery never presented to the grand jury, that there was no record of any grand jury proceedings, and that respondent had made no examination of the books, records and returns, made no assessment of any deficiency in taxes; that the charges in the indictment were false, that the indictment had been secured by confusing petitioner with another Mr. Funkhouser from West Virginia and that many important papers and important testimony was being withheld from the District Court record. Petitioner renewed the motions and amplified his pleadings in the District Court.

The District Court denied the motions and in the Court of Appeals respondent produced as an exhibit ("A") attached to a SECOND SUPPLEMENTAL BRIEF BY RESPONDENT one of the three letters written to Judge Chesnut by petitioner on June 6, 1952 which had been withheld by Judge Chesnut from the District Court Records from June 6, 1952 to August, 1960. The

letter was presented to confuse the Court of Appeals about the writing of the Notice of Appeal of June 6, 1952. It was presented and represented to be the only letter written on June 6, 1952. Respondent told the Court of Appeals:

> "Without seeking to labor the point made by these exhibits, we mention the fact that Mr. Funkhouser has not claimed that he wrote two letters to Judge Chesnut on June 6, 1952, and it would be most remarkable if he had done so and not mentioned it in his letter of December 3, 1952. We respectfully submit that the claim that Appellant attempted to appeal his conviction within the time for appeal has been completely discredited and that the present appeal should be denied."

Reply to Page 4

The Court of Appeals remanded the case to the District Court to receive evidence upon the issues raised. (282 F. 2d 341.)

> JUDGE CHESNUT TOLD THE COURT OF APPEALS: No motion for a new trial was filed and the defendant waived appeal. (Decision of 6-2-58).

> JUDGE CHESNUT HAD ALSO TOLD MR. SORRELL: Here there has been no such action on the part of the defendant here to take an appeal within the time allowed. On the contrary, there is an expressed wish precisely to the contrary. (Tr., 9-10-52, p. 10).

ON SEPTEMBER 11, 1961 JUDGE CHESNUT TESTIFIED IN DISTRICT COURT:

> By JUDGE THOMSEN: I think the proper thing is for him to make a statement.
>
> By JUDGE CHESNUT: To the best of my recollection and belief I did not receive the questioned

letter of June 6th from Mr. Funkhouser either then or at any time thereafter and knew not the contents or purported contents thereof until I had read in the second appeal of Mr. Funkhouser to the Court of Appeals in his case his statement by I think—I'm not sure whether it was a per curiam statement, but I think it was Judge Sobeloff speaking for the Court, that Mr. Funkhouser had said that he had written me this questioned letter and the United States Attorney, Mr. Pearson, had produced a letter of June 6th of different import, which I had received, and upon reading the opinion of the Court of Appeals that Mr. Funkhouser had filed what purported to be a copy of the questioned letter of June 6th, I sent down to the United States Attorney's office and was furnished a purported photostat of that letter. That was, I think sometime in the latter part of 1960. To the best of my recollection that is, I believe, the first time that I saw that letter or what purported to be a copy of it.

JUDGE THOMSEN: Mr. Funkhouser, if there are any questions that you would like me to ask Judge Chesnut, I will be glad to have you address questions to me, and if I think they are proper I may ask Judge Chesnut to reply? (Tr., 9-11-61, pp. 102-103).

By MR. FUNKHOUSER: Judge Chesnut said that I had no idea of appealing, and that's the thought that I would like answered. Is there anything in that letter?

By JUDGE THOMSEN: I think that is what I have got to decide, Mr. Funkhouser, a construction of the letter and what significance Judge Chesnut should have drawn from the letter of June 6, 1952. It seems to be a matter that I must pass upon in the first instance here now which the Court of Appeals will have a chance to hear if either side is dissatisfied with my ruling. You wrote this

letter. This letter is in evidence, and if you want me to draw inferences from it or decide what inferences Judge Chesnut should have drawn from it, I think that is a matter which you must address to me.

MR. FUNKHOUSER: Your Honor, the Judge can so quickly explain that, I think, and we will be through with him, to tell me what he meant when he says that I had no idea of taking an appeal.

Now, that letter does not mention appeal, and that letter was written after the appeal had been written and sent by me.

BY JUDGE THOMSEN: Well, now, Mr. Funkhouser, you are assuming that I am going to find that the handwritten letter of June 6th was sent. Whereas I must consider the whole case in the light of every paper which you signed on that day and other statements which were made to Judge Chesnut before the sentence was imposed.

I have given you a great deal of freedom in this hearing to present evidence and to argue the case as we go along because these points are more or less separate points. Judge Chesnut has made a statement, and I have asked him some additional questions.

Are there any other questions that you want me to put to Judge Chesnut or that you would like to ask Judge Chesnut?

MR. FUNKHOUSER: Yes, Your Honor: Judge Chesnut said that he has no recollection of receiving a letter from me which mentioned the appeal. Now, in his statement in open court he said he received a letter that he did mention appeal, and what did he mean by that?

BY JUDGE THOMSEN: You just can't ask those questions which are loaded questions because that isn't what he said. If you sent that letter to Judge Chesnut which you say you sent, then we have

one situation. I have got to decide whether you sent that letter or not as a matter of fact, and in order to decide that question of fact I have to consider all of the matters before me including the letters which were admittedly sent and received, the letters which were sent after June 6th to see whether I think they would have been sent and the language would have been used which was used, if you had sent the letter of June 6th or if you had not sent the letter of June 6th and must also read what was said at the hearing of June 10, 1952 in that connection. I must make that finding of fact based on all of these factors which you have quite properly called to my attention, and it is not for Judge Chesnut to argue the case one way or the other. It is for you and the Government to argue the case to me based upon all of the evidence which has been offered to me.

MR. FUNKHOUSER: Now, Your Honor, I think that Judge Chesnut has volunteered to answer questions, and he has answered several questions. He can answer, very easily, I believe, my questions of whether he believes I was satisfied to not file a notice of appeal, whether what I did of record showed that I had no intention of appealing.

I wrote a letter, Your Honor, to him and told him that he had been deceived and imposed upon, and I said other things in that letter which indicate that I was not satisfied with what happened.

Judge Chesnut admits that he received that letter. I didn't say anything in that letter about an appeal because I had already filed in the Court my notice of appeal.

But I would like him to just answer that question, and I believe that he can do it easily.

By JUDGE CHESNUT: My reference was made to your genuine letter of June 6th which the Court

of Appeals described as of different import from the one that you set up that you said you sent later.

MR. FUNKHOUSER: Now, Judge Chesnut said in his tone of voice that one letter was genuine.

JUDGE THOMSEN: What's that? He says in his tone of voice?

MR. FUNKHOUSER: That one letter was genuine, from which it is inferred that another letter maybe that he received was not genuine. Let's clear that up.

By JUDGE THOMSEN: Mr. Funkhouser, we will clear it up. We will clear it up in argument between the Government on one side and you on the other arguing on the evidence before me, and I hereby certify in the record that any reference to a tone of voice by Judge Chesnut which would carry any intimation that he was not being very calm and fair to you at this time is entirely unwarranted, and I will ask Judge Chesnut if he will leave the stand, and unless he wishes to remain he may be excused. (Tr., 9-11-61, pp. 111-115).

That testimony by Judge Chesnut and the questions and answers given shows that Judge Chesnut's testimony at best indicated that he has no recollection of receiving the letter of appeal. That although he admittedly received two letters (Government Ex. "A" and Government Ex. "M-1") both written by petitioner from the Baltimore Jail on June 6, 1952 he only remembers one of the letters and refers to that one as the genuine letter. Both letters (Government Exhibits "A" and "M-1") were found in Judge Chesnut's personal file in 1959 and 1961. Government Ex. "A" was presented to the Court of Appeals by respondent and Judge Chesnut as the only letter

written by petitioner on June 6, 1952. Ex. "M-1" was not located in Judge Chesnut's personal file until September 1961 and there was no explanation of why or how it was stached away in his private file so long. Neither letter was ever filed with the papers of petitioner's case in the District Court or acknowledged in any way. Neither letter made any mention of an appeal. The only letter written by petitioner to Judge Chesnut on June 6, 1952 which mentioned an appeal was the first letter (App. 55) which was petitioner's notice of appeal and which was referred to by Judge Chesnut in open Court as follows:

> By JUDGE CHESNUT: Now, I recall receiving a letter from Mr. Funkhouser during that period, shortly after, and before present counsel came into the case, which was generally to the effect that he had no idea of appealing. (Tr., 9-10-52, p. 11).

That statement by Judge Chesnut to Mr. Sorrell on September 10, 1952 describes the only letter written by petitioner shortly after the sentence was imposed and before Mr. Sorrell came into the case which mentioned the idea of appealing. Petitioner testified that it described the notice of appeal. (App. 55).

Reply to Argument on Page 4

1. Petitioner says that on May 11, 1962 he delivered 40 copies of the petition for the writ of certiorari to the Clerk of the Supreme Court and his check for $100.00 in payment of the filing fee and executed a petition to be signed by a Justice of the Supreme Court granting an extension of time for filing the record from the Court of Appeals of the Fourth Circuit. And on that same day, petitioner delivered to the

Clerk of the Supreme Court a receipt for service of two copies of Petition for writ of certiorari acknowledged this 11th day of May 1962. Signed, Archibald Cox, Solicitor General.

Petitioner says that his Petition was filed in time.

2. Petitioner says that his contentions have merit.

Reply to Page 5

(a) Petitioner says that the Internal Revenue Law of 1939, Section 145(b), under which he was prosecuted provides penalties for "failure to collect or truthfully account for and pay over any tax imposed by this chapter or any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof" (Sec. 145(b)).

Petitioner had reported all gross income and all expenditures and had complied with all of the requirements of the Internal Revenue Laws of 1939 (Sec. 41, 51, 54) and under the applicable law it was the statutory duty of respondent to examine those returns and determine the correct amount of income subject to the tax, Sec. 54), determine the correct amount of the tax (Sec. 57), make the required computations and determine if a deficiency in tax did exist (Sec. 271), and then if in the case of any taxpayer the Commissioner determined there was a deficiency in tax the chapter required the Commissioner to mail a 90-day notice of deficiency to the taxpayer and provided that the taxpayer could petition the Board of Tax Appeals for a redetermination of the deficiency and the Commissioner was prohibited from making

any assessment of a deficiency until the decision of the Board became final (Sec. 272).

Under those sections of the Internal Revenue Law no tax was due payable or evaded as charged by respondent. The sums set up in the indictment were false and prohibited by statute (Sec. 272). They were so ruled by the Department of Justice and the case was returned to the Internal Revenue for the required examination. (Government Exhibit "A").

The scope of Rule 35 is not limited. The wording is clear and covers the facts in this case. It is not to be confused with Rule 36 which authorizes the correction of clerical mistakes but Rule 35 is applicable to the correction of an illegal sentence at any time.

> "The Court may correct an illegal sentence at any time."

Rule 35 is the natural and logical authority for the execution of the Purpose and Construction of the Federal Rules of Criminal Procedure. Rule 2 sets out the purpose and construction of the rules as follows: These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

That is exactly what this petitioner is asking in this petition.

The cases cited by respondent are not applicable in this case.

Ford v. *United States*, 233 F. 2d 56, 58, 59, and *Commerford* v. *United States*, 64 F. 2d 28, 30.

In both of those cases the taxpayer failed to report gross income. Neither Ford or Cummerford reported correct gross income while the Court in this case found all gross income and all expenses were reported.

> By Judge Chestnut: In this case the Government does not charge fraud on the part of the taxpayer in the failure to report correct gross income but only alleges fraud in making deductions from gross income. (App. 8).

Petitioner listed all gross income and all expenditures of that income and it was the statutory duty of respondent (not petitioner) to make the determination of the correct amount of legally allowable deductions to determine the correct amount of income subject to tax. (Sec. 54, 57, 271, 272).

Reply to Page 5 (b)

Petitioner was a resident of the District of Columbia and he made and filed his returns in the District of Columbia and paid his taxes in the District of Columbia. Respondent maintained an office in the District of Columbia where petitioner had always transacted all business with respondent.

The prosecution of this case in Baltimore was unjust and when the facts were called to the attention of the Treasury Department, the Joint Committee on Internal Revenue Taxation, the House Ways and Means Committee, Judiciary Committee of the United States Senate, the Judiciary Committee of the House of Representatives and the Attorney General of the United States they had the Congress pass 72 Stat. 512, approved August 6, 1958 whereby a defendant can make a motion to be tried in the judicial district in which he was residing when the alleged offense of

income tax was committed. The injustice in this case has been recognized and corrected by the Congress of the United States and the President. The injustice of this prosecution should be corrected by the Court.

Reply to Page 6 (c)

Petitioner says that he does not contend that the indictment was signed by an Assistant United States Attorney. Petitioner says that the paper presented as an indictment in this case was not signed by any Assistant United States Attorney but is a plain forgery of the name of Bernard J. Flynn the United States Attorney. Bernard J. Flynn, the United States Attorney whose name was forged on the paper, testified that he did not sign it. No Assistant United States Attorney signed it. The paper bears nothing but a plain forgery of Bernard J. Flynn's name. It was not signed by the attorney for the Government as required by Rule 7 (c) of the Federal Rules of Criminal Procedure. Bernard J. Flynn did not present the case to a grand jury. No Assistant United States Attorney signed the fake indictment. Somebody who had no authority to sign his name as an attorney for the Government, or someone who wanted no share in the responsibility for the false paper forged the named of Bernard J. Flynn on the paper. The record shows there was confusion about the identity of petitioner and this petitioner was confused with a prominent Mr. Funkhouser from West Virginia who owned the largest building in Baltimore and had recently bought the John J. Raskob property on the Corsica River near Baltimore. (E. 47).

The record shows that respondent confused the United States Attorney and the District Judge. The

record shows the District Judge in his Charge to the jury said petitioner owned "twenty-five or thirty apartment houses or buildings": (App. 18). And because petitioner owned a few acres of land on the South River the Judge brought that to the attention of the jury as follows:

> By JUDGE CHESNUT: Was the 70 acres wooded or not?
>
> RESPONDENT'S WITNESS: Yes, I might say, I would say that from my observation the land is wooded because it is on the South River, and you can see that on the north side. Arms Creek is on the south side, and you enter in from a private beach. I mean it is made up of private owners who have bought lots in there and they divided it up into beach lots.
>
> By JUDGE CHESNUT: How many front feet of waterfront does he have?
>
> RESPONDENT'S WITNESS: I can't estimate it Your Honor.
>
> By JUDGE CHESNUT: What is the depth of the water there at the shore?
>
> RESPONDENT'S WITNESS: The depth of the water I would say in Arms Creek, I can estimate it would be more shallow than out in South River there. Arms Creek does feed into South River which is navigable.
>
> By JUDGE CHESNUT: Well, I think you have the description of the particular item which would seem to make the thing relevant.
> (Tr., 5-21-52, pp. 99-100).

There was no examination of the books and records or of the income tax returns, no determination of the correct amount of income subject to the tax, no inquiry about the items, no computation of the allowable

depreciation, no tabulation of the items, no determination of the amount of tax, no determination of any deficiency in tax, no notice of any deficiency, no redetermination of a deficiency by the Tax Court, no assessment of any deficiency in tax. There was nothing but some "assumed figures" set up by an agent without any inquiry or examination and then confusion about the parties, confusion with the Mr. Funkhouser from West Virginia, confusion and exaggeration about the property and apartments owned and confusion about the woods, number of feet of waterfront and the depth of the water there at the shore of some of the property. (Tr., 5-21-52, pp. 99-100).

The record shows that neither respondent, the United States Attorney, the District Judge nor the jury knew what it was all about and they were all confused from the beginning by the respondent. The agent testified that he had made no inquiry about the particular items, no inquiry about the specific checks, the amount of mortgage indebtedness, had made no calculation of the items, had made no tabulation of the items (App. 27, 28, 35, 36, 46, 48) and had just set up several different sets of "assumed figures" all of which were just reckless assumptions and known to be wrong (App. 48-49). Known to be wrong from the beginning as respondent told the Court:

> By Mr. Green: As a matter of fact, from the beginning it was never considered possible to work this case on a net worth basis. (Tr., 6-3-52, p. 1360).

On those facts it is easy to understand why no record was made of any grand jury proceeding and why no

United States Attorney or Assistant United States Attorney would sign the indictment. Why the case was started on a false forged indictment.

Reply to Page 7 (d)

The record shows that the Clerk of the Court notified petitioner's lawyer, T. Howard Duckett, that Rule 55 of the District Court required a local lawyer, that the Clerk waived the rule, and entered Duckett's appearance but the Court promptly appointed G. C. A. Anderson, the law partner of his son-in-law, Wilson K. Barnes, to revise the rules and G. C. A. Anderson retained the rule and the Court approved it. Anderson and Judge Chesnut's son-in-law Wilson K. Barnes split the fees paid by petitioner for the trial of the case and before the trial was completed, before the jury decided the case, G. C. A. Anderson forced petitioner into a decision to pay Anderson and Barnes a fee for an appeal or agree to begin serving the sentence immediately and file his own Notice of Appeal. The record shows that all of petitioner's letters of June 6, 1952 were diverted from the District Court files and were withheld from the record to frustrate any appeal of the case. That after petitioner had hired other counsel the local lawyers of Anderson and Barnes offered to pursue the case on the Notice of Appeal filed by petitioner on June 6, 1952 for a minimum fee of between seven and eight thousand dollars. (Exhibit "A").

The record shows that the local counsel forced on petitioner for the trial of this case by the local District Court Rule 55 failed to adequately represent petitioner from the failure to object to the phony, false, forged indictment to the request to the Judge to immediately

impose the sentence and the securing and filing of a consent to the immediate beginning of the sentence when a fee for an appeal had not been paid or agreed to before the case was completed.

Reply to Page 8 (e)

This Court has repeatedly held that it has power to correct injustice and illegality.

This sentence was the unjust and illegal conclusion of an unjust and illegal prosecution begun in violation of the statutory provisions for the determination of income taxes. This petitioner had complied with all of the requirements of the Internal Revenue Laws when he kept books and records and made and filed income tax returns in which he reported all gross income and all expenditures of that income.

This prosecution was illegal and prohibited by Section 272 of the law when there had been no inquiry about the particular items listed on the return, no determination of the correct amount of income subject to tax (Sec. 54), no determination of the correct amount of the tax (Sec. 57), no determination of any deficiency in tax (Sec. 271), no notice of any deficiency in tax as required by Section 272, no redetermination of any deficiency by the Board of Tax Appeals as required by Section 272 and no determination or final decision by the Board of Tax Appeals. No assessment of any deficiency in tax was made. No tax was determined, due, owing or payable as charged. The Department of Justice had rejected the case for prosecution and had returned it to the respondent for the required examination. The testimony of respondent shows that no examination had been made and respondent took some "assumed figures" to Baltimore

and confused the United States Attorney as to the identity of petitioner and confused petitioner with another Mr. Funkhouser from West Virginia, and confused or falsely stated that certain taxes were due, owing, payable and evaded. Respondent or somebody forged the name of the United States Attorney on a paper for a phony, false indictment, there is no record of any grand jury proceeding as required by Rule 6 (c) of the Federal Rules of Criminal Procedure and the petit jury was never given any calculation, computation or tabulation showing any tax determined, due, owing payable, assessed because none of those things had been done. Instead the jury was told about the age, education, experience, property, trees, number of front feet of waterfront, depth of the water there at the shore of some of the property which was ruled relevant.

Those are only a few of the things in the record of this case which brought about the illegal sentence which petitioner here asks this Court to correct. This Honorable Court has the power to correct this illegal sentence.

The record shows that before this illegal prosecution was completed the local counsel began djscussions with petitioner to secure a commitment for, or payment of an appeal fee in the event of a conviction at the end of the case, and when petitioner did not then immediately pay the local counsel for the filing of an appeal the counsel concluded that petitioner would not appeal and he went before the Judge immediately after the verdict and asked the Judge to immediately impose the sentence and immediately secured a consent to begin serving the sentence and although petitioner had ten days thereafter in which to decide

to appeal the case the local lawyer tried to foreclose that right by an immediate waiver of appeal. The record shows the local lawyer was the law partner of the son-in-law of the Judge.

The record shows that on the same day the sentence was imposed this petitioner began his efforts to have the illegal sentence corrected by writing four letters complaining of the sentence and petitioner has continued his efforts from that day to this day. Three of the letters written by petitioner on June 6, 1952 were written to the Judge who tried the case. None of them were recorded in the record of the case or acknowledged. They are now back in the record and they should be considered by this Honorable Court. Petitioner prays this Honorable Court to grant to petition and examine the record in this case.

Respectfully,

ROBERT E. FUNKHOUSER,
Petitioner

Davidsonville, Maryland.

June 20, 1962

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961

No. 977

ROBERT E. FUNKHOUSER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR REHEARING

ROBERT E. FUNKHOUSER,
Petitioner

Davidsonville, Maryland

July 18, 1962

King Bros. Inc., Printers, 208 N. Calvert St., Balto., Md. (7-16-62—50)

IN THE

Supreme Court of the United States

October Term, 1961

No. 977

ROBERT E. FUNKHOUSER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING

Comes now the petitioner and petitions the Court to grant a rehearing of the petition for a writ of certiorari filed in this Case on May 16, 1962 and denied by this Court on June 25, 1962.

FACTS

1. The record in this case shows, entirely by respondent's testimony and Court records, that this case was unjust and illegal from the beginning. Respondent admits that petitioner reported all gross income and all expenditures of that income in the income tax returns filed. Thus petitioner complied with all of the requirements of the Internal Revenue Law of 1939 (Sec. 41, 51, 54). The record shows the prosecution was unjust and illegal from that beginning.

The sentence was illegal. Justice requires that the illegal sentence be corrected.

2. The record shows that this case was begun by respondent on "assumed figures" set up by respondent's agent who testified that he had made no inquiry about the particular items or the specific checks listed on the returns, had made no inquiry about the mortgages or mortgage interest payable, had made no calculation of the listed items, had made no computation of the allowable depreciation, had made no tabulation of the listed items and had just set up several different sets of "assumed figures" in violation of Section 272 of the Internal Revenue Law and had then set up several different sets of "assumed figures" for the charges in this case.

3. The record shows that respondent took those "assumed figures" to the Department of Justice where they were examined and rejected for criminal prosecution and the case was returned to respondent for the examination required by law. (Sec. 54, 57, 271, 272).

4. The record shows that thereafter there was no examination of the books, records or returns and the agent just took the "assumed figures" to the United States Attorney in Baltimore, Maryland and confused the United States Attorney with the "assumed figures" and confused him about the identity of this petitioner and confused this petitioner with a Mr. Funkhouser from West Virginia; forged the name of the United States Attorney on a false paper charging some "assumed figures" as taxes, due, owing, payable and evaded.

5. The record shows that this petitioner, a resident of the District of Columbia was then arrested on the false,

forged, confused paper set up as an indictment and filed by respondent in the District Court in Baltimore.

6. The record shows that petitioner immediately employed a reputable Washington lawyer but the lawyer was confronted with a local court rule which required petitioner to be represented by a local Baltimore lawyer.

7. The record shows that petitioner was forced to hire local counsel and the record shows the local counsel forced on petitioner by the local court rule failed to properly defend petitioner from the beginning of the case to the end of the case. From the beginning the local counsel failed to question the false, confused, forged indictment or the "assumed figures" set up by respondent's agent as taxes due, owing and payable without his having made any inquiry, calculation, computation of the books, records or returns and set up in direct violation of Sections 51, 57, 271, 272 which required such examination and the determination of the amount of income subject to tax.

The record shows that the Judge told the jury that no examination or tabulation was at all necessary. The Judge told the jury that the agent could set up any "assumed figures" and contentions without any examination or tabulation and whatever he "assumed or contended" was tax due, owing and evaded and the Judge ruled that such assumptions and contentions were taxes due and could not be disproved by proof of an examination by a C. P. A. or accountant. The Judge told the jury: At the beginning of the case:

> By Judge Chesnut:
>
> Well, now, have you made any tabulation? I do not think that it is at all necessary, I am merely inquiring as to whether you have made any tabulation of what

his aggregate amounts are for that year, which appear on these books. (Tr. 5-21-52, page 27).

At the ending of the case:

By Judge Chesnut:

Well, he does it because he is an official of the United States authorized to determine what tax is correct according to the contention of the Government, but Mr. Golomb is not an official of the United States and he has no authority to tell this jury what the tax is and what the tax is not, but you can argue from your computation. (Tr., 6-3-52, page 1413).

That ruling by the lower court, and many similiar rulings were unjust and illegal. They were in violation of sections 54, 57, 271, 272 of the Internal Revenue Code and they brought about the illegal sentence in this case.

8. The record shows that the local counsel forced on petitioner for the trial of this case failed to object to the misstatement of the applicable law to the jury by the Judge when the Judge quoted the last 62 words of Section 145(b) as the law of the case.

By Judge Chesnut:

Now, coming to the particular charge in this case, the particular charge is an alleged violation of Section 145(b) of Title 26, United States Code which, in material part, reads as follows:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, together with the costs of prosecution.

That section of the law was not applicable in this case

when this taxpayer had reported all gross income and all expenses and had paid the tax due on his assessment of the tax. The respondent had not made any examination of the books, records or returns and had not determined or assessed any deficiency in tax as required by Sec. 54, 55, 271, 272. The record shows that respondent knew and told the Court that he knew the figures set up in the false, forged indictment were simply "assumed figures which could not be legally worked". Respondent told the Court:

> By Mr. Green:
>
> If Your Honor please, in 1944, 1946 and 1947 the figures shown on the Government's program as a corrected net income figure are slightly different from the figures stated in the indictment, and I was asking Mr. Hannum's tax computation on the basis of both the indictment figure and the figures appearing in our score sheet. (Tr., 5-27-52, pages 494-496).
>
> By Mr. Green:
>
> As a matter of fact it was never considered possible to work this case on a net worth basis. (Tr., 6-3-52, page 1350).
>
> By Judge Chesnut:
>
> Now, this case has to do with deductions from income. Now, this case differs from any other income tax case, alleged income tax evasion case, that we have tried in this court by reason of the fact that the Government does not dispute the amount of gross income. It does not dispute the right of the defendant to make deductions from his gross income. The question, is in the case as to whether the making of these deductions in the returns to the Government were made fradulently for the purpose of evasion. That is the only issue in the case. (Tr., 6-3-52, page 1357).

When petitioner had kept books and records and had

made and filed income tax returns in which he had reported all gross income and every expenditure of that income he had complied with all of the requirements of the law (Sec. 41, 51, 54) and it was then respondent's statutory duty (not the duty of this petitioner) to examine those books and records and determine which if any of the listed expenditures were deductible. Petitioner listed each item of expense claimed as a deduction and it was the duty of the Commissioner (not this petitioner) to make the legal determination of which items (if any) were allowable or were not allowable.

> Section 29.54: Every person subject to the tax, shall, for the purpose of enabling the Commissioner to determine the correct amount of income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income and the deductions, credits, and other matters required to be shown in any return under chapter 1.

> Section 29.57 EXAMINATION OF RETURN AND DETERMINATION OF TAX BY COMMISSIONER. As soon as practicable after returns are filed, they will be examined and the correct amount of the tax determined under such proceedure as may be prescribed from time to time by the Commissioner. (See Section 272).

The record in this case shows that petitioner had complied with all of the requirements of the law when he reported all gross income and all expenses so that they could be examined by respondent and could be pointed out ONE BY ONE. Respondent told the jury:

> By Mr. Green:
>
> We have, members of the jury, at great length specified to you *one by one* the various expenses which Mr.

Funkhouser on his books and records, and in his income tax returns, said were incurred in connection with his business. 3 Tr., 6-4-52, page 5).

The record shows that when petitioner had reported all gross income and all expenses "ONE BY ONE" he had complied with all of the requirements of the law and it was then the statutory duty of respondent to examine those returns and determine the correct amount of the tax under such proceedures as may be prescribed from time to time by the Commissioner. It was the duty of the Commissioner and not this petitioner to determine the correct amount of the tax.

This prosecution was unjust and illegal on those facts.

The record shows that the Commissioner did not examine the returns and did not determine the correct amount of the tax and did not determine any deficiency in tax. The record shows that the agent testified that he did not make any inquiry about the particular items (App. 28), made no inquiry about the mortgages or interest payable (App. 35-36), made no inquiry about the specific checks (App. 46), made on calculation of the listed items (App. 27), made no computation of the allowable depreciation (App. 48), made no tabulation of the listed items (App. 27), determined no deficiency in tax (E. 27) mailed no notice of deficiency (E. 27), made no assessment of any deficiency in tax (E. 28).

The record shows that on those facts, *shown in the record by respondent's testimony*, there was no deficiency in taxes determined, due, owing, payable or evaded as charged in the phony, false, forged paper on which this case was prosecented as an indictment.

The record shows that with that beginning respondent had petitioner arrested in Washington, D. C., and hauled

before the United States District Court in Baltimore where his lawyer was not permitted to represent him because the lawyer did not maintain a law office in Baltimore. The record shows that the local Baltimore lawyers forced on petitioner for the trial of this case did not cite a single section of the applicable law or a single case and that respondent cited cases which were not applicable to the facts in this case such as:

CUMMERFORD v. U. S., 64 F. 2d 28, 30,
FORD v. U. S., 233 F. 2d 56,
GUZIK v. U. S., 54 F. 2d 618.

Respondent cited those cases as authority for the criminal prosecution in this case but respondent ignored the fact that in each of those cases the taxpayer had failed to report correct gross income. There [redacted] was no such failure on the part of this taxpayer to report correct gross income or expenses as every dollar received and every dollar expended was "specified ONE BY ONE" and respondent failed to examine those returns, determine the correct amount of taxable income, determine the correct amount of the tax, determine, assess or impose any deficiency or afford petitioner any opportunity to petition the Board of Tax Appeals for a review or redetermination of any proposed deficiency. This prosecution was unjust, illegal and vicious from the beginning.

The record shows that respondent's agent just went to Baltimore, set up several different sets of "assumed figures", falsely set out that the "assumed figures" were taxes, due, owing and evaded; confused the United States Attorney as to the identity of this petitioner and confused this petitioner with a Mr. Funkhouser from West Virginia

and forged the name of Bernard J. Flynn on the phony, false, forged paper for the indictment in this case.

9. The record shows that the local Baltimore lawyer forced on petitioner by the local court rule failed to properly defend petitioner in the trial and before the case was completed the local counsel confronted petitioner with demands for a fee for an appeal of the case and before the jury had considered the case and while the jury was still out considering the case, and before the verdict of the jury was returned the local counsel decided that if a fee for an appeal was not paid to him before the verdict of the jury and before the case was concluded that he would immediately ask the Judge to immediately impose the sentence and would have petitioner fingerprinted and would secure and file in the court a paper agreeing that petitioner would immediately start serving the sentence.

10. The record shows that the local counsel had petitioner fingerprinted and had a paper signed agreeing to the immediate beginning of the sentence but the local counsel did not record that paper and he withheld it from the Court records while he and his law partners discussed and determined the minimum amount they would accept for their appeal. The record shows that the law firm of Anderson, Barnes and Coe discussed the fees from June 6, 1952 until June 19, 1952 when they quoted a minimum fee of seven or eight thousand dollars for an appeal which they would prosecute on the Notice of Appeal filed by petitioner on June 6, 1952. They knew that petitioner had protected the right to appeal by the letter of June 6, 1952 to Judge Chesnut and they knew that there was no hurry in their discussions and in arriving at the amount of the fee as they would avail themselves of the Notice of Appeal filed by petitioner on June 6, 1952.

11. The record shows that on the same day the sentence was imposed, June 6, 1952, this petitioner wrote THREE letters to Judge Chesnut, the District Judge who tried the case and who had imposed the sentence in each or which he complianed to the judge of the different "assumed figures" set up by respondent and the imposition and deceit for the false, forged, confused indictment and sentence. And then on that same day, June 6, 1952, the record shows petitioner wrote a FOURTH letter to the local counsel asking counsel to quote their price for pursuing the appeal.

12. The record shows that all FOUR of petitioner's letters of June 6, 1952 were received and read, THREE of them by Judge Chesnut and the FOURTH by the local counsel but the record shows that all FOUR of those letters were kept out of the District Court records by returning, withholding or rejecting them and the record shows that in addition to those FOUR letters written on June 6, 1952 that petitioner wrote a FIFTH letter on June 28, 1952 to Judge Chesnut complaining about the illegal sentence which FIFTH letter was filed in the District Court by Mr. Serrell and was promptly removed from the District Court records and was mailed to petitioner in Petersburg Virginia Reformatory by Judge Chesnut.

ALL FIVE OF THE LETTERS written in June 1952 complaining of the illegal sentence were removed from the District Court records to frustrate any appeal of the illlegal sentence.

The FIRST letter of June 6, 1952 was received, read, it was noted that it concerned an appeal, and it was mailed to petitioner's wife in Washington, D. C., with a suggestion that it be turned over to local counsel.

The SECOND letter of June 6, 1952 was received, read and stached away in Judge Chesnut's private file until August 1960 when it was presented as the only letter written on June 6, 1952.

The THIRD letter of June 6, 1952 was received, read and stached away in Judge Chesnut's private file until September 11, 1961 when it was disgorged.

The FOURTH letter of June 6, 1952 was received, read, discussed and a fee of seven or eight thousand dollars was quoted for the appeal noted in the FIRST letter of June 6, 1952.

The FIFTH letter of June 28, 1952 was filed in the District Court by Mr. Sorrell and it was read, commented on and removed from the Court records and mailed by Judge Chesnut to petitioner in Petersburg Reformatory in Petersburg, Virginia with advice to make other use of it.

13. The record shows that with those letters removed from the District Court records, the Transcripts of Proceedings showing that the letter of appeal had been received and showing that respondent had testified that there had been no inquiry, calculation, tabulation or examination of the books, records or returns and that no tax was due, owing, payable or evaded as charged promptly disappeared from the District Court files.

14. The record shows that it took petitioner eight years to get proof in the record that the FIRST letter of June 6, 1952 had been received, read and not filed in the District Court records. The Transcript of Proceedings of 9-10-52 was not returned to the Court records until December 18, 1959 and the Transcript of Proceedings of 5-20-52 was returned to the records on 9-11-61 to make the record show

that all FIVE letters of June 1952 had been received and they showed that from the very day the sentence was imposed petitioner had vigorously complained about the sentence and had done all within his power to appeal the case.

The Transcript of September 10, 1952 proceedings showed the receipt and acknowledgment in open court that the FIRST letter of June 6, 1952 addressed to Judge Chesnut expressed petitioner's idea of appealing.

> By Judge Chesnut:
>
> Now, I recall receiving a letter from Mr. Funkhouser during that period, shortly after, and before present counsel came into the case, which was generally to the effect that he had no idea of appealing. (Tr., 9-10-52, page 11).

That was the first proof in the record that any of the FOUR letters written by petitioner had been received, their contents noted and that they were being withheld from the record. The next proof that the SECOND letter had been received and had been withheld from the record came into the record in August 1960 when respondent presented to the Court of Appeals as Government Exhibit "A" attached to the SECOND SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES the SECOND letter written by petitioner on June 6, 1952. It was produced by respondent and represented to be the only letter written by petitioner on June 6, 1952 to confuse the Court of Appeals.

The THIRD letter written by petitioner to Judge Chesnut on June 6, 1952 was put into the District Court record by respondent on September 11, 1961 when it was produced

from Judge Chesnut's personal files by Mrs. Ried where it had been kept from June 6, 1952 until September 11, 1961.

Proof that the FOURTH letter written by petitioner on June 6, 1952 had been received was put into the record of the case on September 11, 1961 when G. C. A. Anderson testifying as a Court witnes testified that he had a letter which acknowledged receipt of the FOURTH letter of June 6, 1952 regarding the appeal of the case. (E. 72).

The record shows that the Clerk of the District Court refused to file that letter on direction of Judge Thomsen who had made findings of fact and conclusions of law that petitioner had made no attempt to appeal this case:

JUDGE THOMSEN SAID:

> Judge Chesnut denies receiving the disputed letter. Mrs. Ried testified that she did not recall receiving or seeing any such letter, although she always opened the Judge's mail. She further testified that it was Judge Chesnut's regular practice to transmit any such letter to the Clerk, with a covering letter or memorandum, and to reply to the writer. Judge Chesnut's fairness is proverbial; his scrupulousness in handling his correspondence with prisoners is an example to all judges. It is incredible that he would have failed to transmit such a letter to the Clerk. (E. 79).

The records shows those findings of fact are contrary to the record in this case. The record shows that Judge Chesnut stated his policy at that time to be:

BY JUDGE CHESNUT:

> I receive many such application within sixty days of the imposition of the sentence and I take the trouble to read most of them, but this last one, well, I think it was received possibly a day or so before or after the sixty days, but it was not presented to me by counsel, and of

course, you would not reasonably expect me to take the initiative in it, to communicate with counsel to discuss the matter. (Tr., 9-10-52, pages 17-18).

That record shows that Judge Chesnut's regular practice at that time as stated by Judge Chesnut at that time was to "not take the trouble to read some of the letters he received after the imposition of the sentence, but this last one (a letter from this petitioner) he was confused as to when it was received and it was not presented by counsel, and of course, you would not reasonably expect me to take the initiative in it, to communicate with counsel to discus the matter."

That statement of policy by Judge Chesnut clearly sets out the practice which he followed in his post conviction cases at that time and it completely disapproves the findings of fact set out by Judge Thomsen as quoted above.

And the record shows that Judge Chesnut does not testify that he did not receive the FIRST letter written by petitioner on June 6, 1952. The FIRST and only letter of June 6, 1952 which mentioned petitioner's idea of appealing the case which Judge Chesnut referred to in open court on September 10, 1952. He says he did not read all of the letters received and "to the best of my recollection I did not receive it".

When Judge Chesnut was placed on the witness stand on September 11, 1961 as a Court witness he was questioned by Judge Thomsen about the penciled written letter written by petitioner in the Baltimore Jail on June 6, 1952 immediately after the sentence was imposed as follows:

Question by Judge Thomsen:

I think a statement from Judge Chesnut should be

in the record as to whether or not he received that pencilled-written letter to which reference has been made.

ANSWER BY JUDGE CHESNUT:

To the best of my recollection and belief I did not receive the questioned letter of June 6th from Mr. Funkhouser either then or at any time thereafter and knew not the contents or purported contents thereof until I had read in the second appeal of Mr. Funkhouser to the Court of Appeals in his case his statement by I think—I'm not sure whether it was a per curiam statement, but I think it was Judge Sobeloff speaking for the Court, that Mr. Funkhouser had said that he had written me this questioned letter and that the United States Attorney, Mr. Pearson, had produced a letter of June 6th of different import, which I had received, and upon reading in the opinion of the Court of Appeals that Mr. Funkhouser had filed what purported to be a copy of the questioned letter of June 6th, I sent down to the United States Attorney's office and was furnished a purported photostat of that letter. (E. 34-35).

The record shows that Judge Chesnut now admits he did receive TWO letters from petitioner written on June 6, 1952 which he did not transmit to the Clerk and did not acknowledge in any reply to the writer. The record shows he just kept those letters in his private file from June 1952 until August 1960 when he released one of them to the United States Attorney for presentation to the Court of Appeals as the only letter written by petitioner on June 6, 1952 (Government Exhibit "A"); while he retained the THIRD letter of June 6, 1952 (Government Exhibit M-1) in his private file until September 11, 1961 when it was disgorged and put into the record after repeated denials that it or any other letter had been written.

The record shows that the FOURTH letter written by petitioner on June 6, 1952—the day the sentence was imposed—was received by the local law partners of Judge Chesnut's son-in-law Wilson K. Barnes who was then living with Judge Chesnut at 111 Ridgewood Road in Baltimore and it was discussed by them and in reply to that FOURTH letter of June 6, 1952 they quoted to petitioner a minimum fee of seven or enght thousand dollars for an appeal which they would base on the Notice of Appeal in the FIRST letter to Judge Chesnut of June 6, 1952.

The discussions about the fee lasted from June 6, 1952 until June 19, 1952 and the fee of seven or eight thousand dollars quoted by Anderson and Barnes on June 19, 1952 proposed to proceed with the appeal on the Notice of Appeal filed by petitioner on June 6th in the FIRST letter to Judge Chesnut. (Mandamus Ex. "A").

The record shows that the injustice of respondent prosecuting a criminal tax case in a district foreign to the district in which taxpayer was residing has been called to the attention of Congress and it has been corrected by the Congress by 72 Stat. 512, approved August 6, 1958 and the local District Court rule by which the District Court required petitioner to employ local counsel has not been enforced since the injustice in this case has been exposed and it has been amended. (E. 81). Thus two of the errors and injustices complained of have already been recognized and corrected. The injustice done in this case however has not yet been corrected.

The injustice of the illegal prosecution on reckless "assumed figures" set up without any inquiry, examination, calculation, computation, tabulation, determination of the amount of income subject to tax, determination of the cor-

rect amount of the tax, determination of a deficiency in tax, notice of deficiency and opportunity for any review or redetermination of any proposed deficiency and the assessment of a deficiency and the prosecution on a phony, false, forged confused indictment set up in violation of Rules 6(c) and 7(c) of the federal Rules of Criminal Procedure have not yet been corrected, and they require correction. The injustice and illegality of the removal, rejection, withholding and return of District Court papers important to the appeal and correction of the illegal sentence requires attention and the practice of permitting counsel to force a defendant to decide before a case is concluded whether to pay counsel a fee for an appeal or to have the sentence imposed immediately and begin serving the sentence at once should be corrected. This petitioner was by law afforded a period of ten days after the imposition of the sentence in which to take an appeal in this case and he was denied due process of law when his Notice of Appeal and other papers were removed from the District Court records to frustrate any appeal.

ARGUMENT

In the brief filed in opposition to the petition respondent does not deny petitioner's allegations of injustice and illegality. Respondent only attempts to confuse the facts about the prosecution and the illegal sentence he secured on the "assumed figures" his agent set up in violation of Internal Revenue Law (Sec. 54, 57, 271, 272).

Respondent argues that petitioner cannot raise and question the illegal contentions, assumptions and proceedures used by respondent in the District Court to secure the illegal sentence. Respondent argues that when he had secured the sentence on the contentions and assumptions of his agent

without any inquiry, without any examination, without any calculation, without any computation, without any tabulation, without any determination of the correct amount of income subject to tax, without determination of the correct amount of the tax, without making the required computations to determine if there was a deficiency in tax, without any notice of deficiency, without any review or redetermination of the reckless contentions of the agent, without computation and assessment of any deficiency in tax.

The record shows, by respondent's testimony, that respondent's agents did not comply with any of the Statutory requirements of the Internal Revenue Law for the determination of any deficiency in tax and just set up the several different sets of "assumed figures" for the reckless assumed contentions in this case.

The records shows that without having made any inquiry, examination, determination, assessment of any tax, or the determination of the correct amount of income subject to tax neither respondent nor the jury in this case could determine that any tax was due, owing or evaded. Respondent never made any inquiry, calculation, examination or tabulation of the listed items of income or expense to determine the correct amount of income subject to tax and therefore neither respondent, the District Court or the jury had any facts or figures on which to base any computation or charge that any tax was due, owing or evaded.

The record shows that petitioner had two reputable Certified Public Accountants examine the books, records and returns and one of them, John Berg, convinced the Department of Justice that respondent's charges were "reckless assumptions" not based on any examination or facts and the Department of Justice promptly rejected the assump-

tions and returned the papers to respondent for the examination required by law. (Sec. 54, 57, 271, 272).

The record shows that respondent thereafter made no examination and just took the same reckless "assumed figures" to Batlimore, Maryland and confused the United States Attorney in Baltimore as to the facts, and confused the United State Attorney as to the identity of the petitioner and confused this petitioner with another Mr. Funkhouser from West Virginia, (E. 47), then forged the name of the United States Attorney on a confused, false paper charging the evasion of taxes never inquired about, calculated, tabulated, computed, determined or assessed. The charges on that paper were nothing but assumptions of one of respondent's agent made in violation of Sec. 54, 57, 271, 272 but some one forged the name of the United States Attorney on the paper and presented it to the District Court for the indictment in this case.

The record shows that respondent now tries to justify those reckless asumptions of his agent for the prosecution of this case on the ruling of this Court in FORD v. UNITED STATES 352 U. S. 891 and CUMMERFORD v. UNITED STATES 289 U. S. 759 but in those cases the ruling of the Court was based on the fact that the taxpayers had not reported correct gross income in the returns filed and it was impossible for the Commissioner to compute the correct amount of the tax. The court held that where the taxpayer had falsely reported the amount of gross income received he could be criminally prosecuted without first determining the precise amount of the tax.

In this case the record shows that the correct amount of gross income was reported and every expenditure of that income was reported and specified "ONE BY ONE".

The Department of Justice had ascertained that fact and had returned the case to respondent for the statutory required examination but respondent thereafter made no examination.

The record shows that before this trial petitioner employed a reputable Baltimore accountant, Mr. Philip Golomb, who carefully examined books, records and returns and testified that there was a net loss of $16,113.57 and no tax was due. (App. 52).

The record shows that the testimony of the accountant, Philip Golomb, who had examined the books, record and returns was rejected by Judge Chesnut who ruled that the "assumed figures" of the agent who repeatedly testified that he had not made any examination and that he had not made any inquiry, calculation, computation or tabulation was "what the tax is".

> By Judge Chesnut:
>
> Well, he (the agent) does it because he is an official of the United States authorized to determine what tax is correct according to the contention of the Government, but Mr. Golomb is not an official of the United States and he has no authority to tell this jury what the tax is and what the tax is not. (Tr., 6-3-52, page 1413).

That ruling deprived this petitioner of due process of law because there is no provision of law permitting any agent to set up "assumed figures" and contentions made without any examination and such contentions are directly in violation of the provisions of Sections 54, 57, 271, 272 of the law and which provide the only legal method of determining "what the tax is and what the tax is not".

The provisions of Section 145(b) were not applicable in this case because no tax had been determined, and no tax was due, owing, payable or imposed by the Chapter.

CONCLUSION

The record shows respondent has been careless with the facts presented to this Court. Respondent told this Honorable Court that petitioner's petition was out of time. (page 4).

The record shows that on May 11, 1962 petitioner served two copies of the petition on the Solicitor General and delivered 40 copies of the petition to the Clerk of this Court. The Certified record from the Clerk of the Court of Appeals had not been received and petitioner prepared a petition for an order extending the time for filing to 9-28-62 to be signed by a Justice of this Court. The order was signed and filed. The petition was in time. Respondent was in error.

The record shows that respondent was also in error in his argument that petitioner's contentions are without merit.

2(a). Respondent concedes that no computation or assessment of any tax liability was made before petitioner was convicted of income tax evasion and respondent argues that none was necessary. That is error.

Respondent contends that the penalties of Section 145(b) of the Internal Revenue Code of 1939 are [redacted] applicable.

Petitioner contends there is no provision for the imposition of the penalties for assumptions, contentions, imaginations or charges or gusses of any agent or anyone else. The penalties provided in Section 145(b) apply only to

"the evasion and defeat of any tax imposed by this chapter or the payment thereof" (Sec. 145(b)).

There was absolutely no evidence of any imposition of any tax and from the beginning respondent testified that no inquiry, calculation, computation, tabulation, or examination had been made, no dtermination of any deficiency, no notice of deficiency and no assessment of any tax and no tax was due, owing or evaded.

Respondent repeatedly sited FORD v. U. S. 233 F. 2d 56-59 and CUMMERFORD v. U. S. 64 F. 2d 28, 30 in both of which cases the taxpayer had failed to report correct gross income and in each case the court had held that it was not necessary to make the precise computation and assessment of the tax before a criminal prosecution for failure to report correct gross income. In each of those cases and all similiar cases the court held that the crime was the failure to report correct income on which the correct tax could be computed.

In this case petitioner did report correct gross income and each and every expense claimed. The chapter required the Commissioner (not the petitioner) to examine those returns and to determine the correct amount of income subject to the tax (sec. 54) and examine those returns and determine the correct amount of the tax (Sec. 57). There is no provision for any agent to set up several sets of "assumed figures" without any inquiry, calculation, computation, tabulation or examination and proceed with a criminal prosecution on several different sets of reckless "assumed figures". The charge in the phony, forged indictment was untrue when it stated "he then and there well knew, their joint net income for the said calendar year was the sum of $14,467.57, upon which said net income there was

owing to the United States of America an income and victory tax of $4,294.09".

All income and all expenses had been reported and until respondent had examined the returns as required by law (Sec. 54, 57, 271, 272) neither petitioner nor respondent could know if any tax was due, owing or payable. This prosecution was illegally based on assumptions and "assumed figures" set up in violation of law. It was illegal from the filing of the false, forged, confused, phony indictment when there had been no examination of the books, records or returns and no determination of the correct amount of income subject to tax and no determination or assessment of any deficiency in tax. The record shows that all gross income and all expenses were reported "ONE BY ONE" so that the Commissioner could have examined the returns and could have determined the correct tax.

2(b). No crime was committed in any jurisdiction in the United States when petitioner kept the required books and records and made and filed income tax returns in which he reported all gross income and all expenses.

2(c). The indictment was not signed by any Assistant United States Attorney and there is no record of any Assistant United States Attorney presenting the case to a grand jury. The United States Attorney testified that he did not present the case to the grand jury, did not sign the indictment, and testified "The fact of the matter, and I think we were confused with another Mr. Funkhouser all along, and I was surprised to find out that you weren't the same man. I thought you were from West Virginia" (E. 47). There is no record of any grand jury proceedings as required by Section 6(c) or 7(c) of the Federal Rules of Criminal Procedure. The United States Attorney whose name was

forged on the indictment testified that he did not present it to any grand jury, and there are no District Court records of any grand jury proceedings. The record shows that the District Court ordered petitioner to cease submitting interrogatories to members of the grand jury which kept the facts off the record.

2(d). Rule 55 of the United States District Court for the District of Maryland provided that "no notice required to be signed by counsel shall be accepted by the clerk, unles it is signed by an attorney or solicitor who shall be a resident of and shall maintain an office in this district". That rule was questioned and Judge Chesnut appointed the law partner of his son-in-law to revise the rules and the rule was retained and enforced until the injustice of the rule became notorious and it was then amended. The Court told the Court of Appeals on October 18, 1961 "That rule has not been enforced in recent years in criminal cases and has been amended." (E. 81).

3(e). The record shows that petitioner wrote FOUR letters complaining about the unjust, illegal sentence and the imposition and deception by which it was secured on June 6, 1952. All FOUR of those letters were rejected, removed, returned or withheld from the District Court Records for over eight years when one of them was released by Judge Chesnut from his personal file to be presented by respondent as Government Exhibit "A" attached to the SECOND SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES in August 1960 and represented that letter to be the only letter written by petitioner on June 6, 1952. It had been stached away in Judge Chesnut's personal file and kept off the District Court record from June 6, 1952 and it was presented in August 1960 as the only GENUINE letter and has been so designated and referred

to ever since although all FOUR of the letters written on June 6, 1952 have since been returned to the District Court files as Government Exhibits "A", "M-1", App. 55, and Petition for Mandamus "A". Those FOUR letters written on June 6, 1952 within a few hours after the sentence was imposed and petitioner's "Affidavit of Facts" written on June 28, 1952 which was filed in District Court by Mr. Sorrell and removed and mailed to petitioner in Petersburg by Judge Chesnut afford the best kind of proof and evidence that petitioner was dissatisfied with the injustice and illegality of the case and was repeatedly and forcefully calling the Court's attention to the deception, injustice and illegality of the prosecution and doing it as forcefully and clearly as possible under the circumstances.

The record shows injustice and illegality which this Honorable Court should examine and correct.

Petitioner prays this Honorable Court to grant a rehearing, give this petition more time and consideration than was possible in the time between Thursday, June 21, 1962 and Monday, June 25, 1962 when it was denied by this court with 204 other petitions. The record will show that this petition has merit. Please examine this record.

Petitioner hereby certifies that this petition is presented in good faith and not for delay and for the grounds above specified.

Respectfully,

ROBERT E. FUNKHOUSER,
Davidsonville, Maryland.

July 18, 1962